Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

IN RE: SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION (MDL 926)

CAROL INGLE, et al.,

Petitioners,

v.

DOW CORNING CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are individual claimants who have exercised their right to opt out of a settlement plan approved by the multidistrict litigation district court to which the silicon gel-breast-implant products liability litigation was assigned for pre-trial proceedings. During the MDL proceedings, the court established a Plaintiffs' Litigation Expense Fund and provided for its funding by a system of assessments. Petitioners seek to appeal from an MDL order that imposes an assessment of six percent on monetary recoveries obtained by class members who have opted out of the settlement. The court of appeals dismissed the appeal on the ground that the assessment order was not a final order.

The question presented is whether, contrary to the ruling of the court below, the assessment order, as it applies to women who have opted out of the settlement, is a final order under the Collateral Order Doctrine of *Cohen v. Beneficial Industrial Loan Corporation.*

LIST OF PARTIES

Pursuant to Rule 14(b) Petitioners Carol Ingle, Barbara Brennan, Carolyn Juanita Facundus, Ann Margaret Huff, Chloe Acuff, Deborah Vanetten and Rosalee Mouzon submit this list of parties pursuant to Supreme Court Rule 14(b). Tens of thousands of persons are potentially interested in this appeal and its outcome. Given the scope of this litigation, combined with its continuously changing character, it is very difficult to identify and list all interested persons. This List identifies the parties represented by the undersigned law firm in this appeal, as well as attorneys and other persons or businesses of whom the appellants are aware have an interest in the outcome of this appeal.

Baxter Healthcare Corp.

Baxter International, Inc.

Bristol-Myers Squibb Co.

Inamed Corp.

McGhan Medical (California Corp.)

McGhan Medical Corp. (Delaware Corp.) a/k/a McGhan Medical/3M

Medical Engineering Corp.

Minnesota Mining & Manufacturing Co. a/k/a 3M Company

Union Carbide Chemical & Plastics Co.

Union Carbide Corp.

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Bristol-Myers Squibb, Surgitek:

Richard Eittreim – McCarter & English

Corning, Inc.:

William D. Eggers – Nixon, Hargrave, Devans & Doyle

Dow Chemical:

Herbert L. Zarov – Mayer, Brown & Platt

Dow Corning Defendants:

Frank C. Woodside, III – Dinsmore & Shohl

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Carolyn H. Williams – Williams & Connolly

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L. Richard Rawls – Palmierei, Tyler, Wiener, Wilhelm & Waldron

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Mentor Corporation:

William B. Griffin – Brobeck, Phelger & Harrison

'21' International Holdings, Inc./Scotfoam:

Carl A. Henlein – Brown, Todd & Heyburn

Union Carbide Corp./Chemicals:

John Dames – Kelley, Drye & Warren

3M:

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Petrarch Systems, Inc. Huls America, Inc.:

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit dismissing petitioners' appeal.

ORDERS BELOW

The order of the district court, together with the relevant portions of related orders, is set forth in the Appendix, pages 1-7.[1] The order of the court of appeals dismissing petitioners' appeal is set forth at App. 10. The court of appeals' order denying rehearing is set forth at App. 8-9.

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered on October 6, 1998. The order of the court denying rehearing was entered on December 4, 1998.

[1] Complete copies of these orders are being provided to the Court as a separate Lodging rather than as part of the Appendix as the bulk of the issues covered therein are irrelevant to this appeal.

STATUTE INVOLVED

28 U.S.C. § 1291 provides in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

STATEMENT

Petitioners seek review of the court of appeals decision holding that the order from which they appealed was non-final and hence unreviewable under 28 U.S.C. § 1291 (1998).

Petitioners are members of a class of women (the "Lindsey class") who received silicon gel breast implants. A class action on their behalf was part of multidistrict pre-trial product-liability proceedings assigned by the Judicial Panel on Multidistrict Litigation to Chief Judge Pointer of the Northern District of Alabama in 1992.[2] Petitioners have opted out of a class settlement arrived at in the multidistrict proceedings. They seek to challenge a provision of an order of the MDL court that, despite their opting out of the class settlement, imposes on them an assessment of six percent of any amounts they might recover from the breast implant defendants by way of settlement or litigation of their individual claims.

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[2] Petitioners Carol Ingle and Barbara Brennan are named plaintiffs whose cases were transferred to the MDL court. Petitioners Carolyn Facundus, Ann Margaret Huff, Barbara Mack-Gant, and Rosalee Mouzon are absent class members.

The MDL court first addressed the matter of assessments in its Order No. 13, entered July 23, 1993. That order established a Litigation Expense Fund designed to provide for the "fair and equitable sharing among plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation." The fund was to be fed through assessment of a percent of the "gross monetary recovery" of plaintiffs who "settle, compromise, dismiss, or reduce the amount of a claim or, with or without a trial, recover a judgment for monetary damages or other monetary relief, including both compensatory and punitive damages, with respect to a breast implant claim."

The initial assessment order (fixed at five percent of the gross monetary recovery obtained prior to November 1, 1993, and six percent thereafter) applied to all breast implant cases "now pending, or later filed, transferred to, or removed to" the MDL court, to "other federal breast implant cases which are not transferred to this court under MDL 926, but in which plaintiff's counsel agrees to this obligation," and to "cases in a state court to the extent so ordered by the presiding judge of that court." Assessments were to be withheld by the defendant or defendants and to be paid into the fund.

In September, 1994, after notice to class members and opportunity to object or opt out, the MDL court approved a so-called "global settlement" providing for settlement of claims out of a fund of $4.2 billion over the course of thirty years. The settlement provided that if claims exceeded the amounts reserved to pay them, benefits would be subject to reduction and class members would

be afforded an additional opportunity to opt out of the settlement. The response to the global settlement in fact overwhelmed the reserves. In addition, Dow Corning, the largest contributor to the settlement, filed a voluntary petition for reorganization in bankruptcy.

Following a breakdown of the initial global settlement, the court invited further consideration. Thereafter, in an order entered on December 22, 1995 (Order No. 27), a substantially revised settlement plan was approved.[3] It provided once more for an opt-out period.

Order No. 27 addressed again the matter of assessments for the benefit of the Litigation Expense Fund. With regard to amounts paid to settlement participants pursuant to the settlement, defendants were assessed a surcharge of six percent to be paid into the Fund. This surcharge would not reduce the scheduled amounts payable to plaintiffs participating in the settlement. With regard to women not participating in the settlement, a notice attached to Order No. 27 states:

> Order No. 13 continues in place, and will continue to govern the resolution, whether by trial or settlement, of breast-implant claims of persons who do not accept (or are not eligible to participate in) the revised settlement, but who either were members of the *Lindsey* class (and did not exercise their initial right to opt out) or, although not members of the Lindsey class (whether because they were ineligible or

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[3] The revised settlement (RSP) does not involve all of the manufacturers who were subject to the earlier settlement plan; not all of the class members eligible for the global settlement are eligible for the RSP; the benefits provided are substantially less.

> because they exercised their initial right to opt out) now or in the future have breast-implant claims that are filed in or properly removed to federal court. What this means is that 6% of the "gross monetary recovery" obtained by such persons, whether by trial or settlement, is to be withheld and paid into the common-benefit expense fund.

In response to Order No. 27, petitioners chose to opt out of the revised settlement. After they did so, the MDL court issued its last assessment order, dated March 26, 1996 (Order No. 30). Order No. 30 made clear that the six percent assessment was intended to reduce the recoveries of persons who, like petitioners, "did not exercise their initial right to opt out of the *Lindsey* class but who at a later date exercise such an opt-out right."[4]

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[4] The full text of Order No. 30, as it applies to the Litigation Expense Fund, is as follows:

> Common Benefit Fund. Under Order No. 13, establishing a Common Benefit Fund to compensate and reimburse attorneys for services performed and expenses incurred for the common benefit of breast-implant plaintiffs, all federal breast implant cases that are settled, compromised, dismissed, or resolved by judgment, are subject to an assessment of six percent of the gross monetary recovery, and the defendants are to withhold this assessment from amounts paid to Plaintiffs or their counsel. In Order No. 27, the Court extended Order No. 13 to impose that same assessment on recoveries, whether in federal or state court or without court action, by persons who did not exercise their initial right to opt out of the *Lindsey* class but who at a later date exercise such as opt-out right.

During the pendency of the appeal, the court below, *sua sponte*, raised the question whether Order No. 30 was final and appealable. Following briefing and oral argument, the court answered that question in the negative and ordered the appeal dismissed. It subsequently denied a petition for rehearing.[5]

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[5] Apart from claiming that Order No. 30 was interlocutory, the corporate respondents argued in the court below that, so far as assessments are concerned, Order No. 30 simply repeated the terms of Order No. 27. On this premise, they suggest that, on petitioners' own theory that the MDL court's assessment is reviewable on appeal, petitioner should have sought review of Order No. 27. The failure to do so, they assert, makes their appeal untimely under the Rules of Appellate Procedure.

The premise is erroneous. The relevant provision of Order No. 30 is not merely an historic recital of what has gone before. Thus, the initial assessment order, No. 13, it will be noted, carefully excepted recoveries in state court unless ordered by that court. Order No. 27 said that Order No. 13 "continues in place" and concludes by stating that this means that opt-out claimants will be subject to a six percent levy on gross monetary recovery. It makes no reference to state claims and it expresses no purpose to override the explicit exclusion of state claims set forth in Order No. 13, which "continues in place." Order No. 30 makes a change that has wide impact; it expressly covers, for the first time, recoveries in state court. Moreover, Order No. 30 states that "[T]his order supplements – and, in the event of inconsistency – supersedes prior orders . . . and applies to all breast implant cases that are now pending in or may later be filed in, removed to, or transferred to this Court."

Neither the district court nor the court of appeals accepted the claim of untimeliness. In extending petitioners' time for appealing from Order No. 30, Chief Judge Pointer expressed reservations as to finality, none as to timeliness. The court below simply held that order "not final."

REASONS FOR GRANTING THE WRIT

This case, like last Term's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), raises important and unresolved jurisdictional and procedural issues that arise from orders of the Judicial Panel on Multidistrict Litigation transferring civil actions involving common questions of fact to a multidistrict court for pre-trial proceedings. *See* 28 U.S.C. § 1407 (1998). In 1992, the Panel transferred all pending federal product liability actions arising from women's use of silicon gel breast implants to the Northern District of Alabama for consolidated MDL pre-trial proceedings. A class action settlement was ultimately arrived at during those proceedings. That settlement, which included a schedule of maximum payable benefits for various types of injury, permitted women who claimed harm from breast implants to opt out of the settlement in order to pursue individual actions or claims for amounts greater than those provided in the class settlement.

Petitioners are among the many hundreds of women who have chosen to exercise their right to opt out of the class settlement in order to pursue their individual claims. Despite their exercise of this opt-out right, the MDL court has imposed, for the benefit of class action counsel, an assessment of six percent of any amounts they individually recover from defendants. Unlike the similar assessment on recoveries by women who have remained in the class and have accepted the class settlement – an assessment which is to be paid by defendants in addition to the recoveries prescribed in the settlement, and which consequently does not reduce settling plaintiffs' recoveries – the assessment on those who opt out is

to be *deducted* from the amount of their recoveries and paid, instead, to class counsel. Millions of dollars have already been deducted from the recoveries of women who have opted out of the settlement; the amounts increase almost daily.

Petitioners seek review of the MDL court's assessment order directed against their individual recoveries. The court of appeals, however, has dismissed their appeal, holding that the MDL court's assessment "is not a final appealable order" and rejecting, *sub silentio*, petitioners' alternative suggestions that the MDL order be treated as an appealable injunction or that the court of appeals review the order through the exercise of its mandamus jurisdiction.[6]

In refusing to review the MDL court's assessment order, the court of appeals did not suggest when, if ever, petitioners might secure effective appellate review. In similar circumstances, the court of appeals for the Fourth Circuit has granted immediate review of an MDL court's assessment order in order to resolve "[a] serious question . . . about the power of a district court overseeing multidistrict litigation to enter an order reaching nonparties and affecting state court proceedings," especially in light of the "purported applicability [of the assessment] to hundreds of litigants and claimants." *In re Showa Denko K.K. L-Tryptophan Products Liability Litigation-II*, 953 F.2d 162 (4th Cir. 1992). This Court should grant the petition

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[6] For the reasons stated below, we believe that the MDL order has all of the requisites of finality. Accordingly, we do not think it necessary to elaborate here upon the possibility of extraordinary relief.

for certiorari in order to vindicate petitioners' right to secure appellate review of the MDL court's assessment order and to resolve existing uncertainty and confusion about the correct and most appropriate means of review of such orders.

1. It is undisputed that petitioners have a right to meaningful appellate review of the MDL court's decision to impose an assessment of six percent on any amounts petitioners recover from breast-implant defendants through state or federal litigation or out-of-court settlements. The MDL court has ordered defendants to deduct the six percent assessment from any such recoveries and to pay the same into a fund that is to be used to compensate class-action counsel for their efforts in achieving a settlement from which petitioners have exercised their right to opt out and thus will obtain no benefit. The assessment order thus reduces the recoveries to which petitioners would otherwise be entitled without giving petitioners any opportunity to challenge the order by refusing to obey it. Moreover, since the order requires defendants, not petitioners, to pay part of petitioners' recoveries into the Litigation Expense Fund, it is apparent that the defendants, who remain subject to the MDL court's jurisdiction pursuant to the class settlement, have every incentive – and no disincentive – to make those payments.

If petitioners' cases and claims remained subject to the jurisdiction of the MDL court, that court's assessment order would properly be deemed to be a non-final order for two basic reasons – the MDL court might, in the future, modify or withdraw the order prior to its having any impact on petitioners and, even if the order remained

in place, petitioners would have an opportunity to include a challenge to it in any appeals from final monetary judgments in their favor. In this case, however, neither of these reasons is applicable. Pre-trial proceedings having been completed in the MDL court, opt-out petitioners who have already instituted breast-implant litigation against defendants will have their cases transferred back to other federal or to state courts. *See Lexecon, supra.* Those transferor courts will not be free to revise or reconsider the MDL court's assessment order as they would if it had been entered in litigation that had not been transferred to the MDL court, but had always remained in the transferor court. Thus, the Federal Judicial Center's Manual for Complex Litigation (3rd) (West 1995), notes that while "the transferor court has the power to vacate or modify rulings made by the transferee [MDL] court, subject to comity and 'law of the case' considerations, doing so in the absence of a significant change of circumstances would frustrate the purpose of centralized pretrial proceedings." Pp. 255-256.

For petitioners who do not institute formal litigation, but who settle their breast-implant claims with defendants out of court, the procedural situation is even worse.[7] In order to seek revision of the MDL court's assessment order, these non-litigating petitioners would be obliged, despite their desire to settle out of court, to institute actions against the defendants with whom they have settled. It is doubtful whether any court would even

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[7] Many of the women who were members of the Lindsey class have chosen to negotiate with defendants in advance of filing a complaint.

consider such an original collateral attack on the MDL court's assessment order; even if it did, it would surely believe it appropriate to give at least as much deference to the MDL court as is appropriate for a transferor court to whom a case is returned after pre-trial MDL proceedings. Where an assessment order directed to defendants is concerned, such deference would, indeed, seem especially called for. If a trial court other than the MDL court, with jurisdiction over one or more of the defendants, were to revise or countermand the MDL court's assessment order, those defendants would find themselves faced with directly conflicting mandates by different trial courts, sitting, at least at times, in different circuits.

Moreover, opt-out petitioners subject to the MDL court's assessment order will have no effective route of appeal from that order if forced to await a judgment or settlement before seeking redress. Unless a judgment is obtained in a district court within the Eleventh Circuit, any federal or state court hearing an appeal from a lower court decision adhering to the assessment order will be in the position of reviewing a court (the MDL court) over which it has no appellate jurisdiction, a process potentially leading to irreconcilably conflicting directions to the defendants. Separate appeals of the assessment order in federal circuits throughout the country also raises the disturbing specter of conflicting appellate judgments regarding the validity of the same trial court decision. Considerations of comity and judicial efficiency call strongly for the recognition of a single appellate forum as the appropriate site of review of the MDL court's assessment order; unquestionably, that forum should be the court of appeals with appellate jurisdiction over the MDL

district court – in this case the Court of Appeals for the Eleventh Circuit.

2. The collateral order doctrine announced by the Court in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), provides a solution to these problems. The court recognized in *Cohen* that Congress' conferral, in 28 U.S.C. § 1291, of jurisdiction on the courts of appeals to review "final decisions of the district courts" should be given a "practical rather than a technical construction." 337 U.S. at 546. Under *Cohen*, a technically non-final order, i.e., an order entered "before (perhaps long before) [a] case has ended" is nevertheless appealable as a "final decision" under § 1291 if it "[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment." *Johnson v. Jones*, 515 U.S. 304, 310 (1995) (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) and *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

The collateral order doctrine "qualif[ies] for immediate appeal classes of orders in which the considerations that favor immediate appeals seem comparatively strong and those that disfavor such appeals seem comparatively weak." *Johnson*, 515 U.S. at 311. The doctrine seems especially designed for dealing with the review of certain class-wide orders entered by an MDL district court to which numerous cases from districts throughout the United States are transferred for pre-trial proceedings by the Judicial Panel on Multidistrict Litigation. When the MDL court ends the consolidated pre-trial phase of these cases, it must transfer those that have not been settled or

dismissed back to the transferor courts in which they originated. *Lexecon*, 523 U.S. at 72. When the pre-trial phase ends, the MDL court has rendered its final decision on the matters entrusted to it by the Multidistrict Panel assignment. As the Federal Judicial Center's Manual for Complex Litigation indicates, reconsideration of these matters by transferor courts (or, *a fortiori*, by courts in which the MDL court's orders might be collaterally attacked) "would frustrate the purposes of centralized pretrial proceedings." *Id.* at 256. *See also* Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978). If the MDL court's decision is thus to be, for all practical purposes, the final district court determination of the matter, it makes eminent sense for that decision to be reviewable at the end of the pre-trial stage and for that review to take place in the single court of appeals with jurisdiction over the MDL court. This is particularly true where, as in the case of an assessment order like that in this litigation, immediate review of the MDL court's final determination of the matter will not delay trial court proceedings or settlement discussions on behalf of women who have opted out of the class settlement. *See Johnson*, 515 U.S. at 311.

The three-part *Cohen* test for collateral final orders clearly applies to the circumstances of this case. The MDL court's six percent assessment on recoveries achieved outside the class settlement was plainly intended by that court to be a conclusive determination of the obligation of opt-out plaintiffs. If it were not so treated by other courts and the defendants, the result would be a serious interference with the funding of the Litigation Expense Fund

set up to compensate class counsel (who will not be counsel in or involved in the various actions and settlements to which the assessment order is meant to apply). The validity and size of the assessment are matters completely separate from the merits of breast-implant claims and litigation and, as we have described above, no effective appellate review of the assessment order will be possible if the MDL court's final determination of that matter is not promptly reviewable in the circuit in which the MDL court is located.

3. Confining itself to the issue of finality, the court below had no occasion to reach the merits. We note briefly that the questions yet to be decided are substantial. If this cause is remanded, the court of appeals will be called upon to consider the appropriate limits upon the power and discretion of a multidistrict litigation court to impose charges upon those members of a plaintiff class who opt out of a class settlement in order to pursue their separate remedies by negotiation or by suit in other fora. This involves, in turn, a number of subsidiary questions.

Is it appropriate to impose the same levy upon those who accept the settlement approved by the MDL court and those who proceed independently, given that the latter will be heavily dependent upon their local counsel to establish the critical elements requisite to a recovery? Is it permissible to impose a uniform levy of six percent of any recovery without regard to individual circumstances, in particular, the fact that many of the opt-outs were unnamed class members only passively and peripherally involved in the proceedings conducted by the MDL court? Was the district court obligated, in all events, to hold a hearing with respect to the provision of its Order

No. 30 that imposed the six percent assessment on those who opted out?[8]

We would point out further that any modification of the district court's order of assessment that might ultimately result from a remand of this cause and a decision favorable to these petitioners would affect as well the rights of those hundreds of similarly situated claimants who have been assessed six percent of their respective recoveries from the corporate defendants. In accordance with an order of the district court setting procedures for collection of those assessments, the defendants, to our knowledge, have thus far withheld more than seven million dollars and deposited the same in designated escrow accounts.

4. Mass tort litigation creates its own set of problems with respect to the sharing of litigation expenses and counsel fees. Those problems tend to be especially complex in the context of multidistrict litigation. Typically, in such cases, committees of counsel are formed to serve a wide range of pre-trial functions on behalf of group members whose interests and positions are in various particulars dissimilar. The proceedings, moreover, are fluid; membership is constantly in flux. Not surprisingly, measures to assess contributions take various forms and shapes. As stated in the Manual for Complex Litigation, p. 29, the MDL judge "has the authority

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[8] While the court did hold a hearing, three years earlier, when it first dealt with assessment in its Order No. 13, that order was much more limited in its reach. *See* ¶¶ 2(a)(2) and 2(c)(2) and (3), App. 3-4.

to order reimbursement and compensation and the obligation to ensure that the amounts are reasonable."

Against this background, one precept emerges with clarity. Appellate review of assessments made by an MDL judge is most assuredly the function of the court of appeals that exercises jurisdiction over the MDL court. The decision of the court below, relegating those who opt out of a class settlement to the possibility of obtaining review of an MDL assessment at a distant time and in a foreign forum, suggests a remedy that is in practical effect illusory.

The issue posed by the instant case – whether petitioners have been effectively denied their right to appellate review – is both substantial and of broad significance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 26, 1999

APPENDIX

Orders of the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

IN RE: SILICONE GEL BREAST IMPLANTS PRODUCT LIABILITY LITIGATION (MDL-926)

Order No. 30, dated March 26, 1966 provides in relevant part:

8. **Common Benefit Fund.** Under Order No. 13, establishing a Common Benefit Fund to compensate and reimburse attorneys for services performed and expenses incurred for the common benefit of breast-implant plaintiffs, all federal breast implant cases that are settled, compromised, dismissed, or resolved by judgment, are subject to an assessment of six percent of the gross monetary recovery, and the defendants are to withhold this assessment from amounts paid to Plaintiffs or their counsel. In Order No. 27, the Court extended Order No. 13 to impose that same assessment on recoveries, whether in federal or state court or without court action, by persons who did not exercise their initial right to opt out of the *Lindsey* class but who at a later date exercise such an opt-out right.

Order No. 13, dated July 23, 1993, provides:

This order is entered in order to provide for the fair and equitable sharing among plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation.

1. Plaintiffs' Litigation Expense Fund to be Established. Plaintiffs' National Liaison Counsel – Francis H. Hare, Jr., and J. Michael Rediker – are directed to establish an interest-bearing account to receive and disburse funds as provided in this order. They may designate an escrow agent for this purpose. Those funds will be held as funds subject to the direction of the court. No party or attorney has any individual right to any of those funds except to the extent of amounts directed to be disbursed to such person under this order. These funds will not constitute the separate property of any party or attorney or – except when and as directed to be disbursed as provided in this order to a specific person – be subject to garnishment or attachment for the debts of any party or attorney. These limitations do not preclude a party or attorney from transferring, assigning, or creating a security interest in potential disbursements from the fund if permitted by applicable state laws and if subject to the conditions and contingencies of this order.

2. Assessment.

(a) All plaintiffs and their attorneys who, after this date, either agree – for a monetary consideration – to settle, compromise, dismiss, or reduce the amount of a claim or, with or without a trial, recover a judgment for monetary damages or other monetary relief, including both compensatory and punitive damages, with respect to a breast implant claim are hereby assessed:

(1) 5% of the "gross monetary recovery," if the agreement is made or the judgment is entered after this date and before November 1, 1993, or

(2) 6% of the "gross monetary recovery," if the agreement is made or the judgment is entered after October 31, 1993.

Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the fund as a credit against the settlement or judgment. If for any reason the assessment is not so withheld, the plaintiff and her counsel are jointly responsible for paying the assessment into the fund promptly upon receipt.

(b) In measuring the "gross monetary recovery":

(1) Exclude any amounts taxed, or potentially subject to be taxed, as court costs that are to be paid by the defendant.

(2) Exclude any payments to be made by the defendant directly to unrelated third-parties, such as to physicians, hospitals, and other health-care providers.

(3) Exclude the value of any services or products that are to be provided by the defendant without charge, or at reduced charges, such [as] those relating to removal or replacement of implants.

(4) Include the present value of any fixed and certain payments to be made in the future (except that, in lieu thereof, a plaintiff may agree to be assessed the appropriate percentage when and as future payments are received).

(c) This obligation:

(1) Applies to all cases now pending, or later filed transferred to, or removed to, this court and treated as part of the coordinated proceeding known as the Silicone Gel Breast Implants Products Liability

Litigation, including cases later remanded to a state court as a result of permitting an amendment adding a non-diverse party (but not including, however, those cases remanded to a state court on the basis that removal was improper).

(2) Applies to other federal breast-implant cases which are not transferred to this court under MDL-926 but in which plaintiff's counsel agrees to this obligation. (It is expected that, in due course, after coordinated MDL pretrial proceedings have been completed in this court and cases are being remanded back to transferor courts for further proceedings, counsel in newly filed and removed cases may agree to the terms of certain orders in this court in lieu of transfer under § 1407.)

(3) Applies to cases in a state court to the extent so ordered by the presiding judge of that court.

(d) If the plaintiff's attorney has a contingent fee agreement with the client, the amount to be paid to the fund shall be charged against, and paid from, the attorney's share of the recovery, except that, if the agreement contains special provisions regarding reimbursement for litigation expenses, one-half of that amount – unless a different portion is stated in the court's approval of disbursement – may be treated in like manner as for other litigation expenses.

(e) Plaintiffs and defendants, and their counsel, are jointly responsible for promptly reporting to Plaintiffs' National Liaison Counsel – or to the escrow agent designated by them – the terms of any settlement or judgment that may be subject to this order. This report is to enable monitoring of compliance with this order. If so provided in a settlement agreement, the terms shall – unless and

until so ordered by this court – be kept confidential and not be communicated by them to other litigants and their attorneys.

(f) Relief from obligation. The court reserves the right to relieve, wholly or partly, a plaintiff from the obligations of this order upon a showing of exceptional circumstances.

3. Disbursements.

(a) Payments may be made from the fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible are not limited to Plaintiffs' National Liaison Counsel and members of Plaintiffs' National Steering Committee, but include, for example, other attorneys called upon by them to assist in performing their responsibilities, State Liaison Counsel, and other attorneys performing similar responsibilities in state court actions in which the presiding state court judge has imposed similar obligations upon plaintiffs to contribute to the fund.

(b) Payments will be allowed only to compensate for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all plaintiffs.

(1) Payment may, for example, be made for services and expenses related to the obtaining, reviewing, indexing, and paying for hard-copies or computerized images of documents from the defendants; to conducting "national" or "state" depositions; and to activities connected with the coordination of federal and state litigation, such as

assessments to pay for the services of the special master appointed by the court for that purpose. The fund will not, however, be used to pay for services and expenses primarily related to a particular case, such as the deposition of a treating physician, even if such activity results in some incidental and consequential benefit to other plaintiffs.

(2) Payments will not exceed the fair value of the services performed or the reasonable amount of the expenses incurred, and, depending upon the amount of the fund, may be limited to a part of the value of such services and expenses. No "bonus" is to be paid merely because the service or expense is undertaken for the common benefit of other litigants.

(c) No amounts will be disbursed without review and approval by a committee of federal and state judicial officers to be designated by the court. The committee may, however, utilize the services of a special master to assist in this review, and may authorize one or more of its members to act for the committee in approving particular types of applications for disbursement.

(d) If the fund exceeds the amount needed to make payments as provided in this order, the court will order an [sic] refund to those who have contributed to the fund. Any such refund will be made in proportion to the amount of the contributions.

4. Modification. The court reserves the power to modify the terms of this order, but no changes imposing any additional burden or obligation on plaintiffs in actions in a state court that has imposed this obligation on such parties will be made without the approval of the presiding state court judge.

Order No. 27, dated December 22, 1995, alerts settling defendants and opt-out claimants to the provisions of Order No. 13 and paragraph 28(b) of an attached notice. That paragraph states:

> Order No. 13 continues in place, and will continue to govern the resolution, whether by trial or settlement, of breast-implant claims of persons who do not accept (or are not eligible to participate in) the revised settlement, but who either were members of the *Lindsey* class (and did not exercise their initial right to opt out) or, although not members of the Lindsey class (whether because they were ineligible or because they exercised their initial right to opt out) now or in the future have breast-implant claims that are filed in or properly removed to federal court. What this means is that 6% of the "gross monetary recovery" obtained by such persons, whether by trial or settlement, is to be withheld and paid into the common-benefit expense fund.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6508

IN RE: SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION (MDL-926)

HEIDI LINDSEY, et al.,

Plaintiffs,

CAROL INGLE,
BARBARA BRENNAN,

Plaintiffs-Appellants,

versus

DOW CORNING CORPORATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

(Filed Dec. 4, 1998)

ON PETITITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, _____ F. 2d _____).

Before: HATCHETT, Chief Judge, DUBINA, Circuit Judge, and KEITH*, Senior Circuit Judge.

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* Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6508

D. C. Docket No. 92-P-10000-S

CAROL INGLE,
BARBARA BRENNAN,

Plaintiffs-Appellants,

versus

DOW CORNING CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(October 6, 1998)

Before HATCHETT, Chief Judge, DUBINA, Circuit Judge, and KEITH*, Senior Circuit Judge.

PER CURIAM:

We dismiss this appeal because the district court's Order No. 30 is not a final appealable order.

APPEAL DISMISSED.

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* Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

(2)

Supreme Court, U.S.
FILED
MAR 24 1999
CLERK

No. 98-1386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IN RE: SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION (MDL 926)

CAROL INGLE, *et al.*,

Petitioners,

v.

DOW CORNING CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MDL 926 PLAINTIFFS' STEERING COMMITTEE

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QUESTION PRESENTED

Petitioners are six litigants who benefitted, along with over one hundred thousand others, from the common discovery and work product conducted by the MDL 926 Plaintiffs' Steering Committee and other plaintiffs' counsel in *In re Silicone Gel Breast Implant Products Liability Litigation*, MDL 926 (N.D. Ala.). Petitioners joined MDL 926 proceedings to gain access to this work product and to participate in a settlement program approved and administered by the transferee court.

Early in the MDL 926 proceedings, in July 1993, the transferee court issued Order No. 13 (Establishing Plaintiffs' Litigation Expense Fund to Compensate and Reimburse Attorneys for Services performed and Expenses Incurred for Common Benefit) to provide partial reimbursement of the time and expense incurred by plaintiffs' counsel for the common benefit, by assessing 6% on the prospective recoveries of breast implant claimants by trial or settlement. Petitioners did not timely object or appeal from Order No. 13, or a later related order (Order No. 27) issued in December 1995.

The court of appeals rejected petitioners' belated attempt to avoid payment of the assessment from their settlements by appeal from Order No. 30, issued by the District Court in March 1996, which chronicled, attached and summarized its pretrial orders (including Orders Nos. 13 and 27) for the convenience of the transferor courts in further proceedings. Petitioners' appeal was dismissed on the ground that Order No. 30 was not a final, appealable order.

At the time of their attempted appeal from Order No. 30, petitioners had participated in the MDL and been on notice

of the common benefit assessment for three years, and had requested and received substantial MDL 926 common benefit work product for their use in settlement or trial. No other challenge or appeal to the district court's common benefit orders is pending.

The question presented is whether Order No. 30, a non-final case management order that chronicles and summarizes the earlier orders of the MDL transferee court for the convenience of transferor courts on remand for further proceedings (including the two common benefit assessment orders that applied to Petitioners, which comport with settled law, and from which they took no timely appeal), is nonetheless appealable by Petitioners under the collateral order exception of *Cohen v. Beneficial Industrial Loan Corporation*.

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Appendix A — Order No. 30 Of The United States District Court For The Northern District Of Alabama, Southern Division Dated March 25, 1996 And Filed March 26, 1996 ..... 1a

ORDERS BELOW

The complete text of the District Court's case management order, Order No. 30, from which petitioners attempted to appeal is set forth in full in Respondents' Appendix, pages 1a-47a.

The District Court's Order No. 13 and pertinent provisions of Order No. 27 are set forth in Petitioners' Appendix, pages 1a-7a.

The Orders of the United States Court of Appeals for the Eleventh Circuit dismissing petitioners' appeal because the District Court's Order No. 30 is not a final appealable order, and denying petitioners' petition(s) for rehearing and suggestion(s) of rehearing *en banc*, are set forth in Petitioners' Appendix, pages 8-10.

STATEMENT OF JURISDICTION

The order of the Court of Appeals dismissing petitioners' appeal was entered on October 6, 1998. Its order denying rehearing was entered on December 4, 1998.

Petitioners invoke 28 U.S.C. § 1291, which provides that "the Court of Appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." The District Court's March 26, 1996 Order No. 30 (Pretrial and Revised Case Management Order) is not a final and appealable order within the meaning of 28 U.S.C. § 1291, or any exceptions thereto. Accordingly, the Eleventh Circuit did not have jurisdiction to entertain it, *see Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983), and this Court should not review it. *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949).

STATEMENT OF THE CASE

On March 26, 1996, the District Court entered its Order No. 30 (Pretrial and Revised Case Management Order), the subject of this appeal, pursuant to § 31.133 of the *Manual for Complex Litigation Third* (Federal Judicial Center 1995), to provide, as the *Manual* recommends, a chronicle of the MDL 926 proceedings, and a

summary of the "rulings that will affect further proceedings" in the courts to whom MDL 926 cases were to be remanded. Order No. 30 made no new rulings. The purpose and function of Order No. 30 is stated in its introduction:

> In view of the recent remand or transfer of a substantial number of breast implant cases, and in anticipation of further remands and transfers, this Court, in accordance with § 31.133 of the *Manual for Complex Litigation, Third*, and after consulting with and receiving suggestions from the parties, is entering this Order to chronicle the proceedings, summarize significant rulings, outline issues remaining for discovery and trial, and indicate the nature and expected duration of further pretrial proceedings that are likely to be needed after remand or transfer or in preparing for additional remands and transfers.

Respondents' Appendix 1a-2a (footnote omitted).

Order No. 30 was thus an order listing and summarizing earlier orders issued by the District Court acting in its capacity as the MDL 926 Transferee Court under 28 U.S.C. § 1407 to determine all matters and motions, including discovery and potentially dispositive motions, arising during the MDL 926 pretrial proceedings. Order No. 30 was hence within the scope of the MDL court's pretrial authority as determined by this Court in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1997) and respects the *Lexecon* delineation between transferee and transferor court functions.[1]

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1. Although Order No. 30 itself did not terminate any of the cases before it, it is well established that 28 U.S.C. § 1407 empowers the MDL transferee court to enter dispositive orders terminating the case. The transferee court exercises pretrial subject matter and personal jurisdiction to the same extent as would the transferor courts. *Lexecon*; *In re Donald J. Trump Casino Securities Litigation*, 7 F.3d 357, 367-68 (3rd Cir.), *cert. denied, sub nom Gollomp v. Trump*, 510 U.S. 1178 (1994); *In re Telectronics Pacing Systems,* (Cont'd)

Order No. 30 is not, by its terms, content, or context, a new or final judgment on any issue, nor a disposition on the merits of any case.[2] Order No. 30 attaches a list of the District Court's numbered pretrial orders and other items, such as the Master Complaint and Master Answers. It was intended and serves as a ready guide to the transferor courts of events and decisions made in MDL 926, to prevent inconsistent rulings, relitigation of issues and duplication of effort in connection with such interlocutory matters by the transferor courts.[3] Order No. 30 was nothing more nor less than the District Court's summary of its pretrial rulings under 28 U.S.C. § 1407, leaving matters of trial and final resolution for the transferor courts. *Lexecon*, 523 U.S.

(Cont'd)

Inc., 953 F. Supp. 909 (S.D. Ohio 1997); *Manual for Complex Litigation, Third*, § 31.131. It is well established that the pretrial orders of the transferee courts, such as those chronicled and attached to Order No. 30, are essentially binding on the transferor courts. *Allegheny Airlines, Inc. v. LeMay*, 448 F.2d 1341 (7th Cir.), *cert. denied*, 404 U.S. 1001 (1971); *Manual for Complex Litigation, Third*, § 31.132. ("Although the transfer court has the power to vacate or modify rulings made by the transferee court, subject to comity and "law of the case" considerations, doing so in the absence of a significant change of circumstances would frustrate the purpose of centralized pretrial proceedings.")

2. As, stated therein, the court entered Order No. 30 "under the authority of Fed. R. Civ. P. 16" and its "abbreviated discriptions" of earlier orders "should not be understood as modifying the basis on which such orders were entered." Respondents' Appendix 1a.

3. *The Manual for Complex Litigation, Third* advises:

> The complete pretrial record is sent to the transferor court upon remand of the case. One of the final actions of the transferee court should be entry of a pretrial order that fully chronicles the proceedings, summarizes the ruling that will affect further proceedings, outlines the issues remaining for discovery and trial, and indicates the nature and expected duration of further pretrial proceedings; transferee courts are not expected to provide transferor courts with status reports during the pretrial proceedings. This order will assist the transferor courts in planning further proceedings and trial.

§ 31.133 *Remand.*

26.[4] Petitioners had not timely taken appeal, or sought certification for interlocutory review under 28 U.S.C. § 1292(b), of any of these rulings, including the 6% assessment orders.

Petitioners seek, throughout their brief, to mischaracterize the sole basis of the District Court's jurisdiction as arising from its certification of a settlement class, and the sole beneficiaries of the common benefit assessment as "class counsel." In fact, the common benefit work was performed primarily by the seventeen-member court-appointed Plaintiffs' Steering Committee (PSC) (some, but not all of whom served as "class counsel"), and the scores of additional plaintiffs' counsel whose common efforts the PSC has coordinated for over seven years, to benefit all breast implant litigants, without regard to class status. Order No. 13 established the common benefit assessment prior to the certification of a settlement class or the implementation of the settlement program, in the early stages of the litigation, to prevent unjust enrichment by litigant-beneficiaries of the common discovery and pretrial effort then underway. By its terms, Order No. 13 was not limited to Class Counsel or the PSC, but established a uniform minimal assessment to compensate and reimburse *all* "attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients." Order No. 13, ¶ 3(a). Petitioners' counsel have not performed any common benefit work for which reimbursement is claimed.

The single provision of Order No. 30 that was the subject of the Petitioners' appeal, ¶ 8, recites prior rulings by the court, made in Orders Nos. 13 and 27, regarding a uniform 6% common benefit assessment on all settlements of breast implant claims by persons

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4. A remand order for further proceedings is not a final judgment within the meaning of § 1291. *Pauls v. Secretary of Air Force*, 457 F.2d 294 (1st Cir. 1972); *Eluska v. Andrus*, 587 F.2d 996 (9th Cir. 1978). "Neither a remand order nor a denial of summary judgment is ordinarily final and appealable under § 1291," even if, at a party's request, it is incorporated into a "judgment." In order to conclude that such a "judgment" was final, it must be "equivalent to an order of dismissal." *Id.* at 999. Order No. 30 is neither styled nor purports to be a "judgment," an order of dismissal, or any other final disposition.

over whom the court had exercised jurisdiction, including those, like Petitioners Carol Ingle and Barbara Brennan, whose individual actions were coordinated in the MDL proceeding, and those, like the other petitioners, who were before the Court for purposes of the revised settlement offer as members of the certified *Lindsey* class and who had not exercised their initial right to opt out of that class. Order No. 30 did not make any new ruling, nor did it extend any previous ruling, with respect to the assessment of 6% on settlements for deposit into the Common Benefit Fund to defray the expenses of the common discovery and pretrial effort conducted by the MDL 926 Plaintiffs' Steering Committee and other plaintiffs' counsel for the benefit of all MDL 926 participants, including Petitioners. Comparison of the provisions of ¶ 8 of Order No. 30 with Orders Nos. 27 and 13 demonstrates that Order No. 30 makes no new or different ruling that would allow an appeal therefrom on the issue of the 6% common benefit assessment.

Under the common benefit doctrine long recognized by this Court, the District Court possessed and exercised its inherent authority and equity jurisdiction to enforce the common benefit obligations it first articulated in Order No. 13 upon the beneficiaries identified and defined in Orders Nos. 13 and 27 (including the Petitioners as named plaintiffs and/or class members in the MDL 926 proceedings), from which Petitioners took no timely appeal.

The *Lindsey* class action to which Petitioners belonged was filed in the Northern District of Alabama in March 1994 as a component of the Silicone Gel Breast Implant Product Liability Litigation pending before the District Court, and was subject to Order No. 13, as were petitioners Ingle's and Brennan's own individual actions which became a part of MDL 926 in 1993. Order No. 13 provided that:

> All plaintiffs and their attorneys who, after this date, either agree — for a monetary consideration – to settle, compromise, dismiss, or reduce the amount of a claim or, with or without a trial, recover a judgment for monetary damages or other monetary relief . . . with respect to a breast implant claim are hereby assessed

> . . . 6% of the gross monetary recovery. . . . This obligation [applies] to all cases now pending, or later filed in, transferred to, or removed to, this court and treated as part of the coordinated proceeding known as the Silicone Gel Breast Implant Products Liability Litigation. . . .[5]

Petitioners suggest that their later election to opt out of the Revised Settlement Program after availing themselves of the Program's claims evaluation procedure (an option that itself was not a requirement of due process or Rule 23, but was negotiated as an added benefit to claimants in the Program) somehow divested the District Court of its common benefit jurisdiction and Petitioners of their common benefit obligations, because the common benefit doctrine extends only to members of formal Rule 23 classes during their period of class membership, or to MDL participants during the pretrial transferee phase. Both premises are incorrect.

Under this Court's common benefit doctrine, when Petitioners finally left the class, by sufferance of a unique settlement feature that provided a third opt-out, their equitable obligations followed them.[6]

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5. Order No. 27 provides that: *Order No. 13 continues in place, and will continue to govern the resolution*, whether by trial or settlement, of breast-implant claims of persons who do not accept. . . . the revised settlement, but who [] were members of the Lindsey class (and did not exercise their initial right to opt out). . . . What this means is that 6% of the "gross monetary recovery" obtained by such persons, whether by trial or settlement, is to be withheld and paid into the common-benefit expense fund. Notice attached to Order No. 27, ¶ 28 (emphasis added).

6. Order No. 13 assessed 6% out of claimants' "gross monetary recovery." Order No. 27 (Approval of Revised Settlement Program and Injunction) provided that settling defendants would pay the 6% on behalf of participating claimants, a feature designed to make this voluntary settlement program attractive to claimants. Petitioners participated in the claims evaluation process of the settlement, utilized the Claims Office facilities, and then elected to opt out, on notice, via Order No. 27, that they would thereafter by governed by the original Order No. 13 assent provision. Petitioners suggest this is unfair treatment; in fact it constitutes a free and informed election on their part to

(Cont'd)

Trustees v. Greenough, 105 U.S. 527 (1881); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

Petitioners' arguments are further premised on the disingenuous suggestion that Petitioners are "state court" litigants whose only connection to MDL 926 was their membership, for over one year, in the certified *Lindsey* class.[7] While such membership, in and of itself, would have been more than sufficient to subject Petitioners to the jurisdiction of the Court and to the 6% common benefit assessment under this Court's common benefit doctrine, factually the connection of petitioners with the federal MDL proceedings was even more direct and long-standing. Petitioners did not exercise their initial *Lindsey* opt-out right in 1994. They remained in the *Lindsey* class, they registered for the *Lindsey* settlement, and they submitted a claim to the court-designated MDL Claims Administrator. They did not exercise their *second* opportunity to opt out when the Revised Settlement Program was announced in December 1995; rather, they submitted proof of manufacturer information to the Claims Administrator in order to pursue their Revised Settlement claim. Petitioners opted out only *after* receiving their Notification of Status letters, which was their third and final opportunity to opt out.

Regardless of their ultimate election with respect to the Revised Settlement Program offers, petitioners benefitted directly from the MDL 926 conduct of coordinated discovery, document collection,

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(Cont'd)
forego the guaranteed benefits of the Revised Settlement Program (including settling defendants' subsidy of the 6% obligation for the prospect of negotiating their own settlements. Order No. 13, from its inception, applied to such independent settlements.

7. As noted above, the lead petitioner, Carol Ingle, was a named plaintiff in her own MDL action predating Order No. 13; her co-petitioners sought formal MDL party status as intervenors in *Lindsey* and were granted intervention in the *Ingle* case. Although activities in state courts would not remove Petitioners from the ambit of Order Nos. 13 and 27, respondents are unaware of any actual or substantial litigation by Petitioners in state courts.

analysis and imaging, and depositions; from the support, assistance and expertise provided by PSC members to plaintiffs' trial teams around the country; and from extensive legal research, briefing, and rulings on common issues. Order No. 30 itself details the results of these efforts, and its scope attests to the comprehensive nature of this common benefit work. These efforts enabled petitioners' claims to become "trial ready," and thus gave them settlement value they would otherwise not possess, without the necessity of substantial individual pretrial effort — effort petitioners' own counsel was not required to undertake, and did not perform.

Moreover, Petitioners used the MDL settlement class, program and infrastructure (including the Claims Office) established and maintained at considerable expense in the MDL proceedings to toll their statutes of limitations and to prepare and evaluate their claims for settlement.

Petitioners seek to enlist this Court to disregard its settled common benefit doctrine, in aid of Petitioners' efforts to avoid their equitable obligations to contribute to the costs of the common efforts that redounded to their benefit as participants in the settlement program and recipients of the work product of the MDL 926 multi-district pretrial proceedings.[8]

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8. Among the benefits the MDL 926 Plaintiffs' Steering Committee's records show petitioners' counsel requested and received from the PSC for use in preparing their claims for settlement or trial, were 14 volumes of Bristol trial exhibits, five trial notebooks, two volumes of issues and abstracts, and two diskettes; five volumes of Baxter trial notebooks; access to transcripts of the depositions taken in MDL 926, the related California coordinated proceedings, and the related Harris County, Texas, proceedings; and video depositions. Earlier in the MDL proceedings, petitioners' counsel requested and received, *inter alia*, the World of Warnings Chart Book, CDS containing thousands of Dow Corning and Baxter documents; the PSC's Subjective Index to documents and the revised/updated March 1994 version of *Silicone Breast Implant Industry: Historical Chronology to the Documents Produced in MDL 926*. These are not mere compilations of documents and deposition transcripts otherwise available: these materials represent the ongoing work product of five years of active MDL proceedings, were supplied at no charge or nominal cost, and could not be replicated without millions of dollars worth of out-of-

(Cont'd)

Petitioners' selective account of the District Court proceedings and their own role therein misstates and omits relevant facts upon which this matter turns. Petitioners are neither state court litigants beyond the reach of the District Court's orders, nor "mere" class members in *Lindsey*: they are named and/or formally joined parties in actions included among those coordinated in MDL 926. Petitioners have no procedural grounds or substantive basis for redress from this Court. To the best of respondents' knowledge, Petitioners are *not* active litigants in federal or state court: they have settled their claims against defendants. No active breast implant litigants are challenging the assessment orders.

There has been no violation of Petitioners' substantive, procedural or due process rights. Petitioners present no equitable argument that could trump the application of the common benefit doctrine to this case. Petitioners assert nothing more than a right to unjust enrichment at the expense of other litigants and counsel. No new statute, unprecedented ruling, or novel policy is at issue. Rather, Petitioners would reverse generations of Supreme Court jurisprudence in a self-serving and ephemeral cause. The 6% common benefit assessment is a paradigm of the common benefit doctrine as articulated, refined and clarified by this Court in a series of decisions that spans over one hundred years. There is no conflict among the federal circuits, or between any of them and this Court, on the District Courts' authority to issue and enforce common benefit orders to fairly apportion case costs incurred at the pretrial stage among all beneficiaries who ultimately obtain recoveries, or on the specific exercise of this power by MDL transferee courts.

(Cont'd)
pocket expenses and attorney, paralegal, and expert time. The 6% common benefit assessment enabled the petitioners and all other breast implant recipients to receive such invaluable information, documentation, and analysis without either the investment of substantial time and effort by their own attorneys, or the payment of substantial costs up front. The common benefit work that the 6% assessment made possible constitutes a substantial savings, in time, money, and effort, that directly benefits petitioners and their attorneys. To date, the District Court has not determined what amount will ultimately be paid to the common benefit attorneys. Under Order No. 13, ¶ 3.(d), any excess will be returned proportionately to the contributors.

REASONS FOR DENYING THE WRIT

Over one century ago, before the enactment of 28 U.S.C. § 1407, and prior to the era of the modern class action under the 1966 amendments to Rule 23, this Court made manifest the federal trial courts' equity jurisdiction to reach beyond the confines of formal joinder and case captions to ensure that all who were the beneficiaries of efforts undertaken for the common good would contribute proportionately to reimburse those services. *Trustees v. Greenough*, 105 U.S. 527 (1881). In essence, the common benefit doctrine acknowledges "the original authority" of the District Courts "to do equity in a particular situation" to prevent unjust enrichment. *Sprague v. Ticonic National Bank*, 307 U.S. at 166. The PSC conducted common discovery and liability analyses for the benefit of others, like Petitioners and their counsel, who avoided the time and expense of replicating this discovery for their own cases. As this Court has observed,

> [t]o allow the others to obtain full benefit from the plaintiffs' efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiffs' expense.

Mills, 396 U.S. at 392.

The 6% assessment with which Petitioners take issue reflects far *less* than it would cost to reproduce the common efforts, which included the review and analyses of millions of documents and scores of major depositions, for use in a particular case. The 6% common benefit assessment was hence neither novel, arbitrary, nor excessive. Under the common benefit doctrine, MDL transferee courts have imposed fee assessments substantially larger than the modest 6% assessment Petitioners seek to avoid. *See In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522, 525-29 (D. Nev. 1987) (7% assessment); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977) (8% assessment).[9]

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9. This pre-split Fifth Circuit decision was binding on the courts below and expresses the prevailing law on MDL assessments.

The *Air Crash Disaster* decision recognized, 22 years ago, the necessity of common benefit assessment orders by transferee courts in multidistrict litigation, and affirmed an 8% cost assessment on all prospective recoveries, to be taken, as in Order No. 13, from the individual lawyers' fees. 549 F.2d at 1011. Although the *Air Crash Disaster* multidistrict litigation was far less complex than MDL 926, the principles the court of appeal articulated for use by transferee courts still stand: that where attorneys, such as the Plaintiffs Steering Committee and others herein, perform "duties beyond their responsibilities to their own clients," assessment of prospective recoveries is "a necessary incident to the goals of multidistrict litigation." *Id.*

This Court's *Lexecon* decision reconfirms the federal jurisprudence and legislative history reflected in the *Manual for Complex Litigation, Third*'s procedures for transferee court case management, §§ 31, *et seq.*, and summarized in Judge Weigel's definitive work, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 578-83 (1978),

> [t]he transferee judge assigned to multidistrict litigation possesses all pre-trial powers over the transferred actions exercisable by a District Court under the Federal Rules of Civil Procedure . . . the transferee judge has authority to decide all pre-trial motions, including motions that may be dispositive, such as motions for judgment approving a settlement, for dismissal, for judgment on the pleadings, [and] for summary judgment.

Thus, the rulings made by the transferee court may, and frequently do, affect the existence, value, prospects and ultimate fate of a litigant's claim or defense long after the multidistrict phase has itself been completed. One such ruling is the common benefit assessment MDL transferee courts may issue to prevent unjust enrichment by litigants, whether individual claimants, as in *Air Crash Disaster*, or class members, as in *Agent Orange*, *infra*, whose claims or cases utilize common benefit work. *Manual for Complex Litigation, Third*, § 20.223; *Air Crash Disaster*, 549 F.2d at 1016.

The *Air Crash Disaster* case affirmed the propriety of assessments by an MDL transferee court against litigants who were never part of a class and who proceeded to settle their claims separately. The specific right of an MDL transferee court to enforce common benefit obligations against the ultimate recoveries of class members after they opt out has likewise been definitively established by the Circuit courts. In *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296 (E.D.N.Y. 1985), modified on other grounds, 818 F.2d 226 (2d Cir. 1987), the Second Circuit recognized that class members who opt out of a class and use MDL work product (as Petitioners did here) can be assessed fees:

> A problem related to the issue of how a fee award affects those class members represented by their own private attorneys concerns those putative class members who opted out of the class. If they use the product of the class representatives' discovery efforts in the subsequent prosecution of their individual opt-out lawsuits, the question arises of whether they should be charged with some of the class's costs of discovery. This issue is particularly important in multidistrict litigations in which attorneys representing individual clients share in the benefits of joint putative class members who opt-out and use MDL discovery materials could be assessed a reasonable fee, to be paid back into the fund as their fair share of the legal expenses assumed by the class. *Cf., e.g., In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977) (requiring those who benefit from lead counsel's work to consolidated litigation to bear a portion of the fee award and reducing their contingent fee liability to their non participating attorneys accordingly); *Doherty v. Bress*, 262 F.2d 20, 22 (D.C. Cir. 1958) (requiring inactive counsel to contribute from his fee receipts), *cert. denied*, 359 U.S. 934, 79 S. Ct. 649, 3 L. Ed. 2d 636 (1969); *Heart Valve Cases*, MDL No. 367 (E.D.N.Y. 1983) (orders charging individual attorneys with costs of joint discovery).

Id. at 1317. Accordingly, in *Agent Orange*, the Second Circuit upheld the District Court's common benefit assessment on opt-outs. 818 F.2d at 239.

The *Manual for Complex Litigation, Third* (Federal Judicial Center 1995) similarly restates the courts' authority to order common benefit reimbursement and advises that the MDL transferee judge should supervise the payment of attorneys' fees and expenses to assure that counsel new to the scene or third parties who pursue their claims elsewhere do not ride the coattails of the parties who have performed the litigation tasks. The *Manual* provides:

> Expenses incurred and fees earned by designated counsel[10] action in that capacity should not be borne solely by their clients, but rather shared equitably by all benefitting from their services. If possible, the terms and procedures for payment should be established by agreement among counsel, but subject to judicial approval and control. *Whether or not agreement is reached, the judge has the authority to order reimbursement and compensation and the obligation to ensure that the amounts are reasonable.*

Manual at § 20.223 at p. 29 (emphasis added); *see also Smiley v. Sincoff*, 958 F.2d 498 (2d Cir. 1992) (transferee judge has authority to assess all counsel for work performed by committee members). *Kopet v. Esquire Realty Company*, 523 F.2d 1005, 1008-09 (2d Cir. 1975).

Petitioners would have this Court impose upon the court of appeal a duty to entertain arguments that depend, for their success, on the obliteration of controlling Supreme Court and appellate precedent, without offering any but a transient, self-serving rationale for the destruction of a venerable equitable doctrine.

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10. "Designated counsel" refers in the *Manual* to counsel and committees, such as the PSC and class counsel in MDL 926 appointed by the court, to perform specific common benefit functions. *See Manual*, §§ 20.2, *et seq.* Petitioners did not object to the appointment of the PSC or class counsel, or to their performance of the common benefit work from which payment they now seek exemption.

Petitioners cite only one decision involving an MDL court, *In re Showa Denko K.K. L-Tryptophan Products Litigation*, 953 F.2d 162 (4th Cir. 1992),[11] in support of their petition. *Showa Denko* is inapposite, procedurally and substantively, to MDL 926. In *Showa Denko*, no class was certified, and the order at issue sought to assess payments from parties to other proceedings, including state court proceedings: Unlike the MDL 926 assessment orders, it thus sought to affect the rights of those who were never before the court. Petitioners here were at all relevant times voluntarily within the MDL court's jurisdiction and the ambit of its orders. Order No. 13 was a proper exercise of the court's jurisdiction over the parties to the MDL proceedings, and Order No. 27 extended the exercise of this jurisdiction to the members of the nationwide *Lindsey* class (including petitioners) that the court had certified as a component of its MDL proceedings.

Appellants argue that Order No. 30 is a final decision of the District Court under the "collateral order" doctrine, thus giving this Court jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), and *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 2458, 57 L. Ed. 2d 351 (1978), articulate the test to be used in determining whether a decision comes within the "small class" of decisions considered to be appealable under the "collateral order doctrine." To be appealable: (1) the order must conclusively determine the disputed question; (2) it must resolve an important issue completely separate from the merits of the action; and (3) it must be effectively unreviewable on appeal from a final judgment. *Id.*[12]

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11. An additional infirmity — requiring a substantial up-front payment from counsel, *before* cases were resolved, to gain access to work product — undercut the *Showa Denko* order. Moreover, the *Showa Denko* court "concluded its order with the certification required for immediate appeal pursuant to 28 U.S.C. § 1292(b)." 953 F.2d at 164. Here there was no request for grant of interlocutory appeal from Orders Nos. 13 or 27. Despite these deficiencies, petitioners' counsel of record herein were among those seeking to *uphold* the *Showa Denko* trial court's assessment order on appeal. 953 F.2d at 163-64.

12. In rejecting the appealability of orders denying class treatment, (Cont'd)

Order No. 30 flunks the "collateral order" test because it does not conclusively determine a disputed question. While petitioners claim that Order No. 30 modifies Order No. 27, and therefore conclusively determines the extent of the 6% assessment imposed by Order Nos. 13 and 27, Order No. 30 refutes this argument by its own terms. As Order No. 30 recites, it was entered to "*chronicle* the proceedings, *summarize* significant rulings, [and] outline issues remaining for discovery and trial . . . ." Order No. 30, p. 1 (emphasis added). The Order goes on to caution that the "abbreviated descriptions should not be understood as modifying the basis on which such orders were entered." *Id.* Furthermore, Order No. 30 specifically states that its terms "do not affect the terms of [the] revised settlement program [approved by Order No. 27]." Order No. 30, p. 2. Paragraph 8 of Order No. 30 from which Ingle, et al. moved appeal, correctly "summarizes" the scope of the assessment imposed by Order Nos. 13 and 27.

The common benefit costs assessment at issue, made early in the MDL 926 litigation and not timely challenged by Petitioners, promotes the well-settled common benefit doctrine established for over one hundred years by this Court in *Trustees v. Greenough* and reflected in numerous federal district and appellate decisions approving and affirming such assessments. This Court's common benefit precedents leave no doubt that the District Court's common benefit assessment orders were procedurally proper and substantively appropriate exercises of its equity jurisdiction over Petitioners. There is no conflict among the circuits, or between any circuit and this Court on the point. Acceptance of Petitioners' unfounded argument

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(Cont'd)

Coopers noted that despite the purported severity of the district court's order, which rang the "death knell" for all plaintiffs' claims, the district court retained ongoing discretion to reconsider and amend its certification order under Fed. R. Civ. P. 23(c)(1). 437 U.S. at 469. Here, Order No. 13 provides for more meaningful ongoing reconsideration of the nominal assessment obligation, in ¶ 2.(f): "Relief from obligation. The court reserves the right to relieve, wholly or partly, a plaintiff from the obligations of this order upon a showing of exceptional circumstances." Petitioners made no such application for relief to the district court. Their circumstances are exceptional only in that they alone, out of thousands of beneficiaries, are determined not to pay their fair share of the common benefit expense.

that the administrative compilation order from which their appeal was attempted satisfies the strict collateral order exception criteria of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), would promote no important or compelling legal, equitable, or social goal. It would merely propel Petitioners on an exercise of ultimate futility: their attempt to undo the important and well-established common benefit doctrine — a doctrine that has served well the legitimate interests of Petitioners and thousands of other breast implant claimants, for the unfair economic advantage of a few.

In *Trustees v. Greenough*, 107 U.S. 527 (1881), this Court established the common benefit doctrine, under which those whose efforts create a common fund for an identifiable class are entitled to recover their fees and costs from all beneficiaries. This doctrine was further articulated and applied in a series of decisions including *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Sprague v. Ticonic*, 307 U.S. at 161; *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970); *Boeing v. Van Gemert*, 444 U.S. 472 (1980); and *Blum v. Stenson*, 465 U.S. 886 (1984). As Justice Frankfurter stated in *Sprague*,

> That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.
>
> Whether one sues representatively or formally makes a fund available for others may, of course, be relevant circumstances in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities

> of the litigation — the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree — hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. 307 U.S. at 166.

Petitioners and their counsel were active throughout the course of the MDL 926 proceedings. They were on notice of the 6% common benefit assessment imposed in 1993 by Order No. 13. Neither they, nor any other MDL participant or beneficiary challenged or appealed from the common benefit assessment at that time. A later order, Order No. 27, entered on December 22, 1995 made it clear that the common benefit assessment applied to all claimants who benefitted from the MDL 926 efforts, including those who exercised the opt-out opportunity granted by the MDL court. Order No. 30 (Pretrial and Revised Case Management Order), entered nearly three years after the common benefit assessment of Order No. 13, and four months after the update and clarification of Order No. 27, was issued for the benefit of transferor courts on remand to

> chronicle the [MDL 926] proceedings, summarize significant rulings, outline issues remaining for discovery and trial, and indicate the nature and expected duration of further pretrial proceedings that are likely to be needed after remand or transfer, or in preparing for additional remands and transfers.

By its own terms, Order No. 30 does not, and cannot, constitute a final, appealable order on the common benefit assessment issue. Neither its clear language nor its procedural context provide any support for any of the three common *Cohen* factors that must conjunctively be satisfied to permit an appeal to the court below, or review by this Court.

Just as the establishment of this Court's common benefit doctrine predated the modern class action and the multi-district statute, by many decades, the District Court's common benefit assessment predated class certification, and extended to the efforts of the scores of plaintiffs' attorneys (most of whom did not seek to be and were

not appointed as class counsel) whose efforts benefitted all claimants.[13] In so doing, the District Court followed the well-established tradition of federal courts coordinated in multi-district proceedings, who have issued and enforced similar common benefit assessments without the presence of a formal class or the inclusion of the assessed beneficiaries therein. *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977); *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522 (D. Nev. 1987); *Awarding Attorneys' Fees and Managing Fee Litigation* (Federal Judicial Center 1994) "common fund and substantial benefit," at p. 51.

While the application of Orders Nos. 27 and 30 to Order No. 13 in the settlement class certification and settlement program contexts provides additional bases and authority for the common benefit assessment, nothing in any of those orders (and, more importantly, nothing in the common benefit doctrine itself) *limits* the application of such assessments to the non-opt-out members of a certified class.

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13. It bears repeating that the application of the common benefit doctrine is not limited to class actions, to class members, or to named parties before the Court. As observed in *Awarding Attorneys' Fees and Managing Fee Litigation* (Fed. Jud. Center 1994) "Common Fund and Substantial Benefit" at p. 51:

> [a]lthough many common fund cases are class actions, . . . the doctrine is not limited to class actions (as noted above). This point was clarified and the common fund doctrine further expanded in *Sprague v. Ticonic* [307 U.S. 161 (1939)], which involved a trust fund that was jeopardized when a bank went into receivership. After the plaintiff successfully sued for a lien establishing her right to recover from the trust, she sought reimbursement of attorneys' fees from the trust. Although the suit had only indirectly established the rights of others, and had not created a fund, the [*Sprague*] Court held that fees were in order . . .

As *Ticonic* holds, Petitioners need not be members of a class nor obtain their recovery from a specific fund-in-court in order to be subject to the court's equity jurisdiction to prevent unjust enrichment by directing contributions "as much as justice requires."

In short, the District Court had subject matter jurisdiction and inherent power to issue its assessment orders under the common benefit doctrine, the District Court had personal jurisdiction to impose its 6% common benefit assessment on those, like Petitioners, who are parties to actions filed in or transferred to MDL 926 and/or members of the *Lindsey* certified class, and the Petitioners' self-serving strategic decision to request, receive, and utilize the fruits of the plaintiffs' common benefit efforts before embarking on the *ex post facto* challenge they have brought to this Court dooms their petition as jurisdictionally deficient and substantively without merit.

A final decision, for purposes of determining appealability, is one which ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1949). Order No. 30 cannot meet this standard. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court recognized a limited exception for orders that do not meet these appealability requirements, provided they

> fall in that small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546.

To qualify for review under the *Cohen* collateral order doctrine, the case must thus present "a serious and unsettled question." *Id.* But the District Court's authority to assess Petitioners their share of the common benefit expenditures is well-settled. Over one hundred years ago, this Court in *Central Railroad and Banking Company of Georgia v. Pettus*, 113 U.S. 116 (1885), upheld the authority of an Alabama District Court to enforce a 5% assessment on creditors "who accept the fruit of the labors of complainants and their solicitors." *Id.* at 127-128. *Trustees*, *Pettus*, and *Sprague* make it clear that the District Court's authority to impose and enforce the 6% common benefit

assessment at issue both predates and extends beyond the bounds of the class actions and multidistrict proceedings.

> The foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393 (1970), quoting *Sprague*, 307 U.S. at 166, noting that this Court in *Sprague* upheld the District Court's power to grant such reimbursement from "others . . . not parties before the court" even though plaintiff "had sued only on her own behalf and not for a class. . . ." *Id.*

Other decisions applying *Cohen* demonstrate that the collateral order doctrine is reserved for those rare instances that "resolve an *important* issue completely separate from the merits of the action. . . ." *Coopers*, 437 U.S. at 468 (emphasis added). In *Coopers* itself, this Court determined that an order decertifying a plaintiff class, and purportedly connoting the "death knell," as a practical matter, of the plaintiffs' claims, did *not* meet *Cohen*'s "importance" criteria. Here, the Petitioners have settled, or will settle, their claims; the common benefit work for which they refuse to pay enhanced the trial-readiness of their claims and established their settlement value, but did not circumscribe their rights to settle or try these claims as they saw fit.

The irony of Petitioners' invocation of *Cohen* in this precedential context is palpable. In *Cohen*, this Court granted review to adjudicate and uphold the validity of a new state statute that protected defendants in derivative suits by providing them security and indemnity for their defense costs and fees in the event of an unsuccessful claim. 337 U.S. at 545. Here, Petitioners would have this Court turn the *Cohen* doctrine upside-down to undo a century of its own jurisprudence providing equitable security and indemnity for the costs and fees of those whose successful efforts create a common benefit.

This Court should have no interest in straining *Cohen*'s modest reach to relieve Petitioners from the common benefit obligations it

has established and re-affirmed, and that the district courts have faithfully implemented, through a century of precedent.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER NO. 30 OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED MARCH 25, 1996 AND FILED MARCH 26, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

CASE NO. CV 92-P-10000-S

(This document applies to all cases)

IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION (MDL-926)

ORDER No. 30
(Pretrial and Revised Case Management Order)

In view of the recent remand or transfer of a substantial number of breast implant cases, and in anticipation of further remands and transfers, this Court, in accordance with § 31.133 of the *Manual for Complex Litigation, Third*, and after consulting with and receiving suggestions from the parties,[1] is entering this Order to chronicle the proceedings, summarize significant rulings, outline issues remaining for discovery and

1. Although this order has been developed through a process of consultation and suggestions, it should not be viewed as an "agreed" order. The Court has entered this order under the authority of Fed. R. Civ. P. 16, and plaintiffs or defendants may disagree with some portions of the order, particularly with respect to the description of certain earlier orders. These abbreviated descriptions should not be understood as modifying the basis on which such orders were entered.

trial, and indicate the nature and expected duration of further pretrial proceedings that are likely to be needed after remand or transfer or in preparing for additional remands and transfers.

This order supplements — and, in the event of inconsistency, supersedes — prior orders entered in CV92-P-10000-S (the master file for MDL 926), and applies to all breast implant cases that are now pending in or may later be filed in, removed to, or transferred to this Court. Upon remand of cases to other federal or state courts (or upon transfer to other federal courts under 28 U.S.C. § 1404 or § 1406), the terms of this order will continue to apply in such cases except to the extent modified, for good cause shown, by such courts.[2] This order should also be treated as a supplemental order in those cases that have been recently remanded or transferred.

1. **Summary of Proceedings.** On June 26, 1992, the Judicial Panel for Multidistrict Litigation ("JPMDL") transferred 78 federal breast implant cases to the Northern District of Alabama (the "transferee court") under 28 U.S.C. § 1407. *In re: Silicone Gel Breast Implants Products Liability Litigation (MDL 926)*, 793 F. Supp. 1098 (J.P.M.D.L. 1992). Since that original order, the JPMDL has entered more than eighty Conditional Transfer Orders or other transfer orders, resulting in transfer of approximately 20,000 cases to this court. Some cases transferred by the JPMDL had been initially filed in a federal district court (the "transferor court"); others

2. Although transferor courts have the power after remand, subject to comity and "law of the case" considerations, to modify or vacate rulings by the MDL transferee judge, this power should, as indicated in *MCL 3rd* § 31.133, be sparingly exercised.

had been removed to a transferor court from a state court.[3] A relatively small number of cases — less than 1,000 — have already, on the suggestion of this court, been remanded by the JPMDL back to transferor courts or have been remanded by this court to state courts or have been transferred by this court to other federal courts under 28 U.S.C. § 1404 or § 1406. Of the approximately 20,000 cases that remain pending in this court, many are ready, or nearing readiness, for remand to a transferor court or to a state court, or for a transfer to another federal court. For convenience, the term "Remand Court" will be used in this order to refer not only to a federal or state court to which a case may be remanded, but also to a federal court to which a case may be transferred under § 1404 or § 1406.

On September 1, 1994, a class settlement was approved under Fed. R. Civ. P. 23(b)(3), with opt-out rights, in the *Lindsey* case. However, because of the amount of claims that would potentially be approved under the criteria of that settlement and because of Dow Corning's bankruptcy proceedings, the Court on December 22, 1995, approved the dissemination of notification of new opt-out rights and of the terms of a revised settlement program affecting claims against certain of the defendants. Class members have been advised of their "opt-out" rights relating to this revised settlement program; but, unless and until they exercise such rights, they are precluded from instituting or pursuing claims against the companies and persons named as settling

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3. Some additional cases initially were either filed in the Northern District of Alabama, removed to this court from Alabama state courts, or transferred directly to this court under 28 U.S.C. § 1404 from other federal courts without going through the JPMDL.

defendants or released parties under the global settlement agreement (or the revised settlement program). The terms of this order do not affect the terms of this revised settlement program.

As indicated in ¶ 6 below, further proceedings in many cases, as well as the institution of new litigation by others, have been barred in whole or in part either because of claims against the Mentor defendants, the Bioplasty defendants, or Dow Corning, or because the plaintiffs were participants in a class settlement. However, with the availability of new opt-out rights that commenced December 1, 1995, more pending cases will soon become ready for remand or transfer. Also, the Court expects that, after exercise of these new opt-out rights, there could be a substantial number of new cases filed in state and federal courts, many of which may be transferred to this court.

2. **Conferences**. This Court held its first conference in this litigation in July 1992. General status and pretrial conferences have been conducted approximately every two months, with numerous additional conferences held to consider special problems and motions. Major rulings resulting from these conferences have been incorporated into written orders. However, from time to time, there have been clarifications and directions from the Court during these conferences that are not embodied in written orders.[4]

3. **Case Management Orders.** The primary orders that have governed the pretrial management of MDL 926 are Order

4. All major conferences have been recorded by a court reporter, and these transcripts can be obtained through Liaison Counsel.

No. 1 (Initial Case Management Order), entered June 26, 1992; Order No. 5 (Revised Case Management Order), entered September 15, 1992; and Order No. 7, entered October 6, 1992. Some provisions of these orders — particularly those relating to the time for conducting and completing discovery — have been modified from time to time, and the Court has entered some additional case management orders relating to particular subjects, *e.g.*, Order No. 11 relating to scheduling and conducting depositions.

(a) **Representative Counsel.** The Court has appointed and assigned certain responsibilities to Liaison Counsel for Plaintiffs, to Liaison Counsel for Defendants, and to a 17-member Plaintiffs' Steering Committee ("PSC").

(b) **Master File.** All orders, pleadings, motions, and other documents (except when not of general application) have been docketed and filed in a Master File, CV92-P-10000-S under the style, "In re Silicone Gel Breast Implants Products Liability Litigation (MDL-926)." Orders and other documents so filed have been deemed as filed in each individual case to the extent applicable, but have not been separately docketed or physically filed in such individual case files except where there was a particular reason to do so.

(c) **Preservation of Evidence.** The parties have been directed by Orders No. 1 and 5 to preserve all documents and other research or exhibits potentially relevant to the subject matter of this litigation. From time to time, this court has entered clarifications and

addressed particular problems relating to preservation of evidence.

(d) **Service of Process.** At the Court's urging, the national defendants agreed to accept service of process in breast implant cases if a copy of the summons and complaint was sent by certified mail, return receipt requested, to the person or address shown in Exhibit B of Order No. 5. Such defendants' agreement to accept service of process applies to any case involving breast implant product liability claims filed in any federal district court or in any state court of general jurisdiction.

(e) **Master/Sample Complaints.**

(1) At the Court's direction, the PSC filed in CV92-P-10000-S a Master Complaint (the operative version is styled "Amended Master Complaint") containing allegations that would be suitable for incorporation by reference in individual cases, together with a sample complaint illustrating how allegations from the master complaint could be incorporated into an individual case. In many cases, there will be only a simplified complaint, adopting by reference allegations from the master complaint.

(2) Allegations of the Amended Master Complaint are *not* deemed automatically included in any particular case. However, to avoid possible problems with statutes of limitation or doctrines of repose, the Court ordered that a motion would

be deemed to be made and be pending in each case (effective upon the case being filed in, removed to, or transferred to this court) to amend the complaint to add any potentially applicable claims and theories from the master complaint not contained in the complaint actually filed in that case. If a plaintiff desires to add any such claims and theories, she should do so through a specific motion in her case filed within 60 days after any remand or transfer; otherwise this "deemed" motion should be treated as withdrawn.

(3) In some cases, amendments to complaints will have been made before remand or transfer, which refine and limit the theories on which the plaintiff will proceed at trial. In other cases, such amendments will be needed in the Remand Court before the case proceeds to trial.

(f) **Master Answers.** At the Court's direction, each of the national defendants has filed in CV92-P-10000-S a Master Answer, incorporating its defenses in law or in fact to claims made against it in the various actions. The answers do not attempt to provide a cross reference to particular paragraphs or counts of the various complaints. The answers do, in a "generic" manner, admit or deny the allegations typically included in claims, as well as make additional allegations as are appropriate to the various claims and defenses.

(1) These Master Answers have been deemed by court order as automatically made by those

defendants in each such case unless and until another answer is filed by that defendant, in which event the individually-filed answer (and not the Master Answer) should be treated as that defendant's response to the complaint.

(2) In some cases, amendments to answers will have been made before remand or transfer that conform to the requirements of Fed. R. Civ. P. 8. In other cases, such amendments may be needed in the Remand Court after the plaintiff's complaint has been refined and before proceeding to trial.

(g) **Additional Defendants.** The Court has typically granted plaintiffs leave to amend complaints to add defendants, without addressing whether or not these amendments would "relate back" or would be subject to a defense based on statutes of limitation or repose.

(1) In ruling on whether any such amendments are barred by statutes of limitation or repose, Remand Courts will need to determine when particular plaintiffs "opted out" of certain federal class actions, most particularly the *Dante* and *Lindsey* class actions. It should be noted that whether statutes of limitation and repose resume running 30 days or 6 months after a person opts out of the *Lindsey* class settlement will depend on when that opt-out right is exercised.

(2) In granting a plaintiff's motion to remand a case to state court (or to suggest to the JPMDL remand to a federal transferor court), this Court has generally required that the plaintiff indicate there are no further defendants to be added. While a Remand Court would have the power to allow addition of a defendant after remand or transfer, this power should be exercised sparingly and only for good cause shown.

(h) **Multiple Plaintiffs**. To consolidate filings and avoid unnecessary duplication and expense, plaintiffs were granted leave, without need for motion or order, to add other plaintiffs to any pending (or subsequently filed, removed, or transferred) case in this court if all plaintiffs in the case (1) were represented by the same counsel; (2) were suing the same defendants; and (3) were implanted in the same state. The result has been that in some cases there may be a large number of plaintiffs. Remand Courts will, after remand or transfer, need to consider in such cases the extent to which severance under Fed. R. Civ. P. 42 for further pretrial proceedings or for trial will be appropriate.

4. **Discovery**. The basic principles that have governed the conduct of discovery were set forth in ¶ 7(a) of Order No. 5, but are repeated here as an aid in understanding some of the details that follow: (1) discovery should be conducted on the assumption that there may be a separate trial of each case (federal or state); (2) additional "true discovery" will not be needed with respect to many potential witnesses who have previously testified in depositions or in trials; (3) video-

taped depositions (which are also stenographically recorded) should be taken for potential use as trial testimony of all persons whose testimony will likely be needed in a number of trials, thereby enabling trials to be conducted in different courts at the same time without complications arising from unavailability of witnesses; (4) through use of a joint plaintiff-defendant federal-state library, all parties in any federal or state court should have quick and inexpensive access to, and the ability to retrieve, (A) all existing and future depositions, interrogatories, requests for admission, and trial transcripts in text-readable and searchable computer files and (B) all potentially relevant documents from the defendants and other sources that are likely to be used during depositions or at trial in more than a single case; (5) claims of confidentiality and use of "protective" orders restricting use of materials should be kept to an absolute minimum; (6) some discovery will be "national" in scope (*i.e.*, potentially needed in various cases throughout the country), while other discovery will be "regional" (*e.g.*, depositions from plastic surgeons performing numerous implants) and still other discovery will be "case-specific" (*e.g.*, depositions of plaintiffs and their treating or examining physicians); (7) the plan should be designed to accommodate coordinated, cost-efficient discovery in both federal and state courts; and (8), in order to minimize unnecessary burdens and expense of redundant discovery, parties should not submit document requests, interrogatories, requests for admission, and notices of depositions without first determining that the materials are not available in the library or are inadequate.

Appendix A

(a) **Documents.**

(1) **Joint Document Depository.** A national document depository, maintained at the joint expense of the PSC and the national defendants, is located in the federal courthouse in Cincinnati, Ohio. The depository houses documents, transcripts, videotapes, and other materials produced by the defendants and third-parties in the litigation. It is accessible to both federal and state court litigants, including counsel involved in related insurance coverage litigation, as well as to nonlitigants. Directed to produce "all potentially relevant documents," the national defendants have to date produced over nine million pages of documents. This document discovery, begun in mid-1992, is now, for all practical purposes, substantially complete, though there is continuing production of some currently-created documents and there are a few remaining disputes regarding production of particular documents, primarily relating to claims of privilege or work-product protection and certain on-going studies. With few exceptions, the documents in the depository can be viewed and copied by any interested person; relatively few documents are subject to any protective order restricting copying, use, or disclosure.

(A) **Racine Warehouse.** Bristol-Myers maintains a large warehouse of documents from the Medical Engineering defendants in Racine,

Wisconsin. The warehouse contains documents from a number of related companies and entities, including Natural Y Surgical Specialties, Aesthetech, Markham Medical, Surgitek, Medical Engineering, and related successor companies. The PSC reviewed the warehoused documents and selected a large number of documents to be sent to the Cincinnati document depository; these documents have been Bates-numbered, copied, and inventoried. There are thousands of additional documents in the Racine warehouse that are not in the Cincinnati depository; but it is unlikely that any litigant will need to review these documents.

(B) **Documents Obtained by Subpoena.** Also available in the depository are documents obtained by the PSC through subpoenas to third-parties, *e.g.*, the Food and Drug Administration, the American Society of Plastic & Reconstructive Surgeons, and the Health Industry Manufacturers Association. Given the documents produced to the depository by the FDA, there should be little reason for FOIA requests to the FDA.

(C) **Documents Produced at Depositions of Former Employees.** Certain former employees of defendants produced documents from their prior employment, pursuant to a subpoena duces tecum at their depositions. These documents have been maintained in the

depository and typically are identified by a letter prefix related to the witness's last name.

(D) **Other Written Discovery Materials.** In addition to the MDL document production, the PSC has obtained and submitted to the depository materials from other breast implant litigation, including state coordinated proceedings, such as the interrogatories and document production requests prepared by the California Plaintiffs' Steering Committee and the defendants' responses to such requests.

(E) **Trial Transcripts and Depositions.** Also available at the depository are copies of trial transcripts of breast implant trials in state and federal courts, as well as depositions taken in such cases that might be of general interest, *e.g.*, depositions of experts. Keeping these transcripts and depositions current is a joint responsibility of the PSC, individual plaintiffs, and the national defendants.

(2) **CD-ROM Disks.** Most documents produced to the depository by the defendants have been "imaged" and are available on CD-ROM disks, each of which contains approximately 15,000 pages of documents (approximately 7 to 8 banker's boxes). In a sense, these disks — approximately 200 at the present time — constitute a traveling document depository since hard copies can be printed from the disks and the parties have

stipulated that accurate printouts from these disks are to be treated as duplicates of the documents on file in the depository. It should be noted that not every document produced to the depository has been so imaged. In particular, some records that are likely to be very case-specific, such as Dow Corning lot-history records and pleadings, may not be on CD-ROM disks and may be available only at the Cincinnati depository.

(3) **Objective Indices and Catalogues.** At the Court's direction, the PSC has, at its expense, reviewed and coded documents produced to the Depository and prepared a computerized database that identifies by number and describes (in neutral words suitable for use by a court preparing a list of exhibits) the various documents produced to the Depository. (National defendants were provided an opportunity to indicate any disagreement as to the PSC's coding of this data.) This database captures such information as document Bates numbers; the apparent dates, authors, recipients, and carbon copies; a brief description of the document; and identifying information regarding its image on CD-ROM disks. It should be noted that, as with certain documents not imaged on CD-ROM disks, some case-specific data has not seen subjected to this review, coding, and computer data-entry by the PSC.

The PSC has also prepared a catalog of CD-ROMs, documents, and databases. This catalog

details documents produced, including a description, the CD-ROM disks, and a list of the work product databases. The PSC has also created an "MDL-926 Box Inventory: Master List of Boxes." This list may be the most definitive source as to what documents have been produced in this litigation and includes a list of boxes produced by the defendants, a list of boxes from the Racine production, a list of boxes produced by third-parties, and a list of documents produced at depositions of former employees.

(4) **Privilege and "Work Product" Logs.** In directing the defendants to produce all potentially relevant documents, the Court recognized that some documents would be privileged or protected by the "work product doctrine." In Orders No. 5 and 12, the defendants were directed to prepare and maintain a "privilege log," listing documents withheld, with sufficient identifying information to permit the parties to determine whether the claim of privilege or protection was appropriate. Although most disputes regarding claims of privilege or work product protection have been resolved by this court or by state courts, there remain some disputes that will be ruled on by the Court over the coming months. (The documents still in controversy are not believed to be sufficiently significant as to justify delay in completing case-specific discovery or in setting cases for trial.)

Appendix A

(A) In ruling on claims of privilege or work-product, this Court has looked to the state laws that would be most restrictive on such claims. The rationale for this approach is that, if a document would not be protected from disclosure under the laws of any state in which a party had been sued, then it would be ordered disclosed in cases from such jurisdiction, which in turn would moot arguments that the document might have been subject to protection under the laws of other states.

(B) From the outset of this litigation, it has been clear that cooperation among counsel and parties was essential for the orderly and expeditious completion of pretrial proceedings. Therefore, the Court has operated under the following general guidelines and urges the continuation of this practice upon remand or transfer: the communication, transmission, or dissemination of information among the Plaintiffs' counsel or among Defendants' counsel in the course of this litigation should not ordinarily be deemed a waiver of the attorney-client privilege, the protection afforded by the work product doctrine, the protections afforded to material prepared for litigation, or any other privilege to which a party may be entitled. Any cooperative efforts, as described above, should not be used against any of the parties, be cited as purported evidence of conspiracy, wrongful action or wrongful

conduct, or be communicated to the jury. However, the mere exchange of information or documents between counsel shall not in itself render such information or documents privileged. Nothing in this paragraph shall in any way affect the applicability of any privileges or protections against disclosure otherwise available under law.

(C) One of the major disputes related to a claim of attorney-client and work-product protection involving certain reports prepared for Dow Corning by Griffin Bell, Esq. This Court ruled that, for the most part, such documents were protected from disclosure under the laws of all states. Given Dow Corning's bankruptcy proceedings, any efforts to revisit this ruling would have to be addressed to the Bankruptcy Court in the Eastern District of Michigan.

(5) **Objections to Admissibility of Documents.** To be separately transmitted to each Remand Court is a stipulation, with voluminous appendices, that should substantially reduce the time spent during trial in providing foundation evidence affecting the admissibility of documents produced to the depository. In general, this stipulation serves both as an agreement to waive various possible objections to documents (such as "best evidence", authentication, and business-records requirements) as indicated in the appendices and as deposition answers under Fed.

R. Civ. P. 31 by defendants to questions affecting admissibility of the documents. Courts and litigants should review carefully the terms of the stipulation to determine its scope, effect, and limitations; the description of the stipulation in this order is not intended to modify or alter the terms of the stipulation, which were carefully worked out over a period of many months.

(A) It should be noted that the stipulation does not address, or attempt to preclude, objections under Federal Rules of Evidence 402 and 403, nor does it address when, during a trial, an otherwise admissible document should be received in evidence.

(B) It should also be noted that the stipulation does not preclude a Remand Court from imposing additional requirements, such as through further pretrial order or under local rules, relating to listing of documents and preserved objections in advance of trial.

(C) The stipulation, with appendices, will be provided to each Remand Court both in "hard copy" and on a computer-disk. Additionally, for convenient reference, a short-list will be prepared and provided that covers the documents most frequently offered at trial.

(b) **The MDL Depositions**. The basic principles governing the taking of depositions were set forth in

Appendix A

¶ 7(f) of Order No. 5 and in Order No. 11 (Deposition Guidelines), entered June 30, 1993.

(1) Hundreds of depositions have been conducted in accordance with these directives, and are available through the depository in hard copy, minuscript, ASCII disks, and videotape. There will be some additional depositions to be taken either by the PSC or the defendants, and, when taken, these will likewise be made available to all litigants.

(2) Under terms of these orders, particularly ¶ 7(f)(6) of Order No. 5 and ¶ 16 of Order No. 11, these depositions should be usable in all Remand Courts, federal and state.

(3) Substantial portions of these depositions have been used by plaintiffs or defendants in various trials in federal and state court that have taken place in the last two years. It can be expected that a major part of the evidence to be presented in future trials will consist of selected portions of these depositions in either videotape or written transcript form. To facilitate presentation of this evidence, Remand Courts should consider requiring the parties in particular cases nearing trial to designate and counter-designate portions of these depositions appropriate to such cases and, if video tape is to be used, to prepare an edited version for use at trial. It is likely that, as additional trials are held, some consensus will develop as to the

portions the parties will want to offer and thereby eliminate the need to repeat this designation and editing process in future trials.

(4) The parties were encouraged by the Court to take "trial-type" videotaped depositions of all persons whose generic testimony would likely be needed in many cases — both to reduce the burden on such persons and to reduce the potential that unavailability of such persons might prevent trial settings or cause continuances of trial. This Court recommends to Remand Courts that only in exceptional circumstances should trials not be scheduled or be continued based on the claimed unavailability of a "key" witness if a videotaped "trial type" deposition of that person, covering the subjects that would be presented at trial, has been taken or if the party should have anticipated the need to take such a deposition.

(c) **Remaining Discovery.** A relatively small amount of "national" discovery remains to be conducted or completed by the PSC or by the national defendants. This remaining national discovery — which is not sufficiently substantial to justify delay in remand or transfer of cases for further case-specific preparation and trial — will continue to be controlled by this Court and, when conducted, will be made available, as appropriate, to Remand Courts and litigants in such courts. The bulk of remaining discovery will be "plaintiff-specific" and may be conducted either while a case is pending in this Court or after it is remanded or

transferred to a Remand Court. The following provisions are intended to govern further discovery in this Court and — subject to a Remand Court's power to alter these provisions by order or rule — discovery in a Remand Court after such remand or transfer.

(1) **Additional Discovery from Defendants and their Employees.**

(A) Further depositions of the national defendants and their current and former employees by the PSC, by individual plaintiffs, or by other defendants will be permitted only with the consent of that defendant or with the approval of this Court (or, after remand or transfer, by a Remand Court). It is anticipated that such depositions will be limited to situations in which discovery of a particular issue is non-duplicative of prior discovery — typically being matters specific to an individual plaintiff — and that, absent a stipulation of the parties or court order for good cause shown, direct examination should be completed in 3 hours.

(B) A national defendant may, with the approval of this Court, preserve the testimony of any of its current or former employees whose health jeopardizes his or her ability to testify in multiple trials, or for other good cause. A national defendant may also, with the approval of this Court or a Remand Court, preserve the

testimony of any of its current or former employee for use in a specific trial.

(C) Further document production requests of a national defendant by the PSC, by individual plaintiffs, or by other defendants will be permitted only with the consent of that defendant, with the approval of this Court, or — with respect to plaintiff-specific documents — by a Remand Court after remand or transfer. Any such request must be accompanied by a showing that the requested documents are not available in the Cincinnati depository.

(D) Interrogatories to a national defendant under Fed. R. Civ. P. 33 or a state counterpart will, unless approved by this Court (or, after remand or transfer, by a Remand Court), be limited to questions relating to identification of experts, expected areas of expert testimony, theories of defense, or identification of trial witnesses or exhibits, where such inquiries have not previously been addressed by the defendant. Questions will not be permitted if the answers would require examination of documents that are available in the Cincinnati depository.

(2) **Discovery from Plaintiffs.**

(A) Implant-recipient plaintiffs and their spouses are required to complete and serve on Defendants' Liaison Counsel (within 60 days

after their case is filed in, removed to, or transferred to this Court) the approved MDL Questionnaire, which is treated as the plaintiff's answer to interrogatories and requests for production. This requirement is waived if such persons have provided substantially the same (or more extensive) information based on discovery requests in the court from which the case was transferred to or removed to this Court. Ordinarily, a case will not be remanded or transferred by this Court unless and until such information has been provided to the defendants.

(B) Defendants may, while a case is pending in this Court or after remand or transfer, conduct a deposition of a plaintiff (and, where applicable, the spouse), limited (unless extended by stipulation or court order) to a maximum of 6 hours of direct examination per person. Supplemental depositions may be permitted as a specific case nears trial if a significant length of time has elapsed since the last deposition of the plaintiff, but must be limited to matters not previously covered or which have changed since the prior deposition.

(C) Defendants may, while a case is pending in this Court or after remand or transfer, depose a plaintiff's treating physicians, limited (unless extended by stipulation or court order) to a maximum of 3 hours per physician (or

6 hours if the physician provides any substantial testimony respecting issues of general or specific "causation"). Supplemental depositions may be permitted as a specific case nears trial if a significant length of time has elapsed since the last deposition of the physician, but must be limited to matters not previously covered or which have changed since the prior deposition.

(D) A plaintiff may, while a case is pending in this Court or after remand or transfer, preserve her trial testimony pursuant to the provisions of the Order Governing Expedited Discovery and The Taking of A Videotaped Deposition for Preservation of Testimony for Trial, entered April 26, 1993.

(E) A plaintiff may also, while a case is pending in this Court or after remand or transfer, schedule a "trial-type" deposition of her treating physicians.

(3) **Discovery of Non-Parties.** Depositions of non-party witnesses who have not previously been deposed and who are not providing "expert" testimony will be permitted in this Court and in Remand Courts as authorized by the Fed. R. Civ. P. or state counterparts. Supplemental depositions of such persons who have previously been deposed will not be permitted, without approval of this Court (or, after remand or transfer, of the Remand Court), on subjects covered in such earlier depositions.

(4) "Expert" Testimony. By a separate order (but, when approved, to be attached as Appendix B to this Order), the Court is establishing provisions relating to further discovery from, perpetuation of testimony from, and pretrial designation of witnesses specially retained or employed by plaintiffs or defendants to provide "expert" testimony under FRE 702 or 703.

(d) **New Developments.** By motion in this Court or in a Remand Court, a party may, notwithstanding the above limitations on further discovery, request permission to seek additional discovery from any party or non-party concerning new or newly-discovered developments and information, including but not limited to new epidemiological, manufacturing, and medical developments, or new legal issues. The motion should set forth (i) the specific discovery being sought and (ii) the reasons why prior discovery could not have adequately developed or addressed the specific area. Any party opposing the discovery request shall move to quash or for a protective order within fourteen (14) days after being served with the discovering party's motion.

5. **Summary Judgment and Other Potentially Dispositive Issues.**

(a) Standard of Review. In ruling on summary judgment motions, this Court has followed the principles clarified in the trilogy of cases decided by the Supreme Court in 1986: *Celotex Corp. v. Catrett*, 477 U.S. 317

(1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Summary judgment is proper if but only if, based on the admissible evidence that would be available and the applicable burdens of production and persuasion, a party would be entitled at trial to judgment as a matter of law because of material facts that either are not in substantial controversy or lack sufficient evidentiary support. Facts in genuine dispute have been assumed to be favorable to the party against whom summary judgment would be entered.

(b) **Choice of Law.** In federal multidistrict proceedings, a transferee court must apply the substantive law of the transferor courts. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litigation*, 745 F. Supp. 79, 81 (D.P.R. 1990) (quoting *Ferens v. John Deere Co.*, 494 U.S. 516 (1990)). The transferor courts in diversity cases would be bound to apply the law of the forum state, including its choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). *See also Manual for Complex Litigation, Third* § 33.254 (1995). This MDL proceeding involves diversity-jurisdiction cases filed in, or removed to, federal courts in 92 of the 94 districts, located in every state, the District of Columbia, Puerto Rico, and the Virgin Islands. This Court must therefore look to the laws of the several states to determine whether summary judgment is appropriate. In ruling on motions by defendants for summary judgment, this Court has based its decision on whether, under the substantive laws of each state, the movant would be entitled to such

judgment in a federal court. Denial of such a motion means only that this court has concluded that under the substantive laws of at least one such jurisdiction the movant would not be entitled to summary judgment.

(c) **Corning Incorporated.**[5] On April 25, 1995, the Court confirmed an earlier order granting summary judgment in favor of Corning Incorporated, concluding that under the substantive law of all states Corning was entitled under Fed. R. Civ. P. 56 to dismissal of breast implant claims against it. 887 F. Supp. 1463 (N.D. Ala. 1995). This order was certified as a final judgment under Rule 54(b). An appeal was taken from this ruling, but later withdrawn. As a consequence, no breast implant claim may be made against Corning in any case that has been (or may hereafter be) filed in, removed to, or transferred to this court, whether or not it is later remanded or transferred to another state or federal court.

(d) **The Dow Chemical Company.**[6] On April 25, 1995, the Court vacated an earlier interlocutory order that had granted summary judgment in favor of The Dow

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5. Corning has never manufactured or distributed breast implants or component parts or materials; it is and has been, however, a 50% stockholder of Dow Corning Corporation.

6. Like Corning, Dow Chemical has never itself manufactured or directly distributed breast implants or component parts of materials, but is and has been a 50% stockholder of Dow Corning Corporation. Dow Chemical has, however, been involved in research and testing of silicone products and provided Dow Corning with at least some of its findings and with some technical assistance.

Chemical Company. 887 F. Supp. 1463 (N.D. Ala. 1995). On December 26, 1995, the Court denied Dow Chemical's motion for reconsideration. The Court concluded that under the substantive laws of at least some states Dow Chemical was not entitled to summary judgment under Fed. R. Civ. P. 56 with respect to claims based on negligent undertaking, Restatement (Second) of Torts § 324A.[7] This remains an interlocutory order, and does not constitute a conclusion that Dow Chemical would be subject to potential liability under the substantive law of each state. It should be expected that a renewed motion for summary judgment or a motion for "directed verdict" will, after remand, be filed by Dow Chemical in many courts based on the substantive law of those jurisdictions, and it may well be that Dow Chemical will be entitled to judgment as a matter of law in some such jurisdictions.

(e) **Bristol-Myers Squibb Co.** On April 25, 1995, the Court denied a motion for summary judgment filed by Bristol-Myers Squibb Co. 887 F. Supp. 1447 (N.D. Ala. 1995). Bristol never itself manufactured or distributed breast implants, but was and is the sole shareholder of Medical Engineering Corporation, a major supplier of breast implants. The Court concluded

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7. Because summary judgment could not be entered in favor of Dow Chemical on the negligent undertaking claim, the Court did not address plaintiffs' additional theories of direct liability, which included strict liability, corporate conspiracy, concert of action, aiding and abetting, fraud, and fraudulent concealment. The Court did, however, grant partial summary judgment in Dow Chemical's favor as to the "corporate control" and "alter ego" causes of action.

that under the substantive laws of most, if not all, states Bristol could be held subject to potential liability both on "corporate control" theories and on certain "direct liability" theories.[8]

(f) **Scotfoam.** On April 25, 1995, the Court granted a motion for summary judgment filed by Scotfoam Corporation and its related entities.[9] 887 F. Supp. 1463 (N.D. Ala. 1995). Scotfoam asserted that it was not liable for alleged injuries to breast implant recipients on the ground, inter alia, that, as a bulk supplier, it had no duty to provide warnings regarding polyurethane foam to breast implant recipients or their physicians. Scotfoam made polyurethane foam, some of which was sold to Wilshire Foam Company, which,

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8. In denying summary judgment, the Court recognized that Bristol had likely been named as a defendant in some cases involving implants sold before its acquisition of MEC in 1982 or before it undertook to conduct and publicize tests relating to the safety of implants. It may also have been named as a defendant in some cases involving Natural Y and Aesthetech implants sold before acquisition of those companies in 1988. The extent, if any, of Bristol's potential liability in such cases will likely depend not only on questions of proximate causation but also on whether the particular jurisdiction imposes any post-sale duty to warn on manufacturers and suppliers of products. The Courts opinion did not attempt to resolve the special issues that may be presented in such cases; such issues may arise in particular cases after remand.

9. These companies include '21' International Holdings, Inc.; '21' Foam Company, Inc.; Knoll International Holdings, Inc.; General Felt Industries, Inc.; Foamex, L.P.; Foamex Products, Inc.; Recticel Foam Corporation; and Scott Paper Company.

in turn, after processing, was sold by Wilshire to several implant manufacturers. The Court concluded that no state would impose liability in a raw material supplier situation like the one that the Scotfoam facts presented. This order was certified as a final judgment under Rule 54(b). An appeal was taken from this ruling, but later withdrawn. As a consequence, no breast implant claim may be made against the Scotfoam defendants in any case that has been (or may hereafter be) filed in, removed to, or transferred to this court, whether or not it is later remanded or transferred to another state or federal court.

(g) **Surgitek, Inc. and Cabot Medical Corp.** On August 9, 1995, in an unpublished opinion, the Court granted motions for summary judgment filed by Surgitek, Inc. and Cabot Medical Corporation. Plaintiffs had apparently sued them because Medical Engineering Corporation, a defendant in many of these cases, previously used the trade name Surgitek in marketing its implants. On March 12, 1992, pursuant to an Asset Purchase Agreement, Cabot purchased MEC's surgical stent and urological fiberoptic scope business, but not its breast implant business. Cabot also purchased the trade name Surgitek, and then formed a subsidiary named Surgitek, Inc. Neither Cabot nor Surgitek, Inc. was ever involved in manufacturing, designing, marketing, distributing, or selling silicone gel breast implant products or any component parts thereof. The Court's summary judgment order was certified as a final judgment under Rule 54(b), and no appeal was taken from this order. As a consequence, no breast implant

claim may be made against Surgitek or Cabot in any case that has been (or may hereafter be) filed in, removed to, or transferred to this court, whether or not it is later remanded or transferred to another state or federal court.

(h) **Federal Preemption.** In mid-1995, the Eleventh Circuit Court of Appeals issued an opinion applying the doctrine of federal preemption under the Medical Device Amendments of 1976, 21 U.S.C.A. §§ 360*c*-360*l*, in a case involving heart pacemakers. *See Lohr v. Medtronic, Inc.*, 56 F.3rd 1335 (11th Cir. 1995). The United States Supreme Court has granted *certiorari* in *Lohr*, and has scheduled oral arguments for later this Spring. The Supreme Court's decision could significantly affect all breast implant litigation, whether in federal or state court. This Court will not consider summary judgment motions based on federal preemption until that decision is issued. This Court, moreover, suggests that Remand Courts should probably defer further trials in breast-implant cases until that decision is issued.

(i) **Baxter Healthcare; Baxter International.** Baxter International, Inc. ("BII")[10] moved to be dismissed from thousands of cases for lack of personal

10. At the time of the November 1985 merger, the name of BII was Baxter Travenol Laboratories Incorporated; at early times, its name had been Don Baxter Intravenous Products Corporation and later Baxter Laboratories Incorporated. After the merger the name was changed to Baxter International, Inc., and for simplicity, the corporation has been known as BII.

jurisdiction. In its motion, BII, a publicly-owned holding company incorporated in Delaware, asserted that, unlike its wholly-owned subsidiary Baxter Healthcare Corporation ("Baxter Healthcare"), also a defendant in these cases, it is subject to personal jurisdiction in only a few states.[11] The Court concluded that, given the form of the corporate merger and reorganization involving American Hospital Supply Corporation, BII was subject to suit throughout the United States to the same extent as would be American Hospital, and on November 29, 1993, denied BII's motion. 837 F. Supp. 1123 (N.D. Ala. 1993). Although interlocutory, this ruling relating to personal jurisdiction is not likely to be contested or raised again in Remand Courts. The conclusions of the Court regarding the nature and consequences of the 1985 mergers also have the effect of rejecting the argument sometimes made by BII and Baxter Healthcare that they have no responsibility for claims against American Hospital (or Heyer-Schulte); if faced with a renewal of this argument, Remand Courts should be able to rely upon this Court's rejection of that position.

(j) **General Electric.** On March 20, 1996, the Court denied a motion for summary judgment filed by General Electric Company that was based on the "bulk supplier" and "learned intermediary" defenses. The Court concluded that there were sufficient factual differences from the Scotfoam defendants (see ¶ 5(f)

11. BII conceded that it is subject to jurisdiction in Delaware, Illinois, Kansas, Missouri, and the District of Columbia and did not contest jurisdiction in cases initially filed in those states.

above) that under the substantive laws of at least some states GE was not entitled to summary judgment under Fed. R. Civ. P. 56. This remains an interlocutory order, and does not constitute a conclusion that GE would be subject to potential liability under the substantive law of each state. It should be expected that a renewed motion for summary judgment or a motion for "directed verdict" will, after remand, be filed by GE in many courts based on the substantive law of those jurisdictions, and it may well be that GE will be entitled to judgment as a matter of law in some such jurisdictions.

(k) **Union Carbide.** There is presently pending in this Court a motion for partial summary judgment filed by Union Carbide Corporation based on the "bulk supplier" and "learned intermediary" defenses.

(l) **Koken's Motion to Dismiss.** Koken Co., Ltd. is a Japanese company that manufactured and sold a relatively small number of breast implants in the United States, either directly or through a distributorship agreement with Porex Technologies, Inc., a Georgia corporation. Koken moved to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, contending that it was not subject to personal jurisdiction anywhere in the United States and should therefore be dismissed from all actions and be relieved from further responsibilities to respond to discovery directed to it as a party. In denying this motion, the Court concluded that Koken was subject to personal jurisdiction for these product-liability claims, at least in Georgia which has a

broad long-arm statute and where the bulk of Koken's contacts with the United States had occurred. The Court has not yet ruled on Koken's motion for reconsideration. Cases against Koken will not be remanded or transferred until that motion is ruled upon; and, if Koken's motion is denied, there will be additional discovery needed from Koken before remand or transfer would be appropriate.

(m) ***Forum Non Conveniens.*** On April 25, 1995, the Court granted motions by the defendants to dismiss, on the ground of *forum non conveniens*, several breast implant cases brought by persons from Australia, England, and Canada who were not citizens or residents of the United States and who had received all their implants outside the United States.[12] 887 F. Supp. 1469

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12. These dismissals were subject to certain conditions to which the defendants agreed:

(1) Each defendant will submit to the jurisdiction of, and accept service of process from, appropriate tribunals of Australia, Canada and England with respect to breast implant claims regarding implantations performed in those countries.

(2) Each defendant will, if so served, be bound to pay final judgments rendered against it by such tribunals relating to such claims.

(3) Each defendant will not, in raising any statute of limitations or similar defense in such tribunals, include the period that a suit, not barred by a statute of limitations in the United States, was pending against it in a court of the United States.

(Cont'd)

(N.D. Ala. 1995). This ruling, which was certified as a final judgment under Fed. R. Civ. P. 54(b), has been appealed to the 11th Circuit Court of Appeals, and that appeal is still pending. In that same order, the Court denied similar motions with respect to certain New Zealand citizens because of unusual circumstances that, for some New Zealanders, had the effect of not affording them any alternative judicial or administrative forum for the resolution of breast-implant claims. The Court has not yet ruled on any similar motions that may be filed in cases brought by persons from other countries.

6. **Special Circumstances Relating to Particular Defendants.**

(a) **Mentor Limited-Fund Class Settlement.** In September 1993 the Court, after extensive briefing, evidentiary submissions, notice, and a fairness hearing, approved a limited-fund mandatory non-optout class-action settlement under Fed.R.Civ.P. 23(b)(l)(B) with Mentor Corporation.[13] *See* 1993 WL 795477 (N.D. Ala.

(Cont'd)

(4) Each defendant will not object to evidence offered in such tribunals that, if offered in federal courts of the United States, would have been admissible against it.

13. The settlement provides for the payment by Mentor of approximately $25 million. The distribution formula for those benefits will be set by the Court at a later time, and it is anticipated that, because of the very limited funds set aside for such recipients, the Court will give preferential, if not exclusive, consideration to those who do not have potential claims against other manufacturers.

1993). The order was certified as a final judgment under Fed. R. Civ. P. 54(b) and there was no appeal from this judgment. One consequence is to bar all further breast-implant claims, whether in federal or state court, against the Mentor defendants relating to implantations that occurred before June 1, 1993.

(b) Bioplasty Bankruptcy. As a result of bankruptcy reorganization proceedings in the District of Minnesota, all further breast-implant claims, whether in federal or state court, against the Bioplasty defendants are barred.[14]

(c) Dow Corning Bankruptcy. The bankruptcy reorganization proceedings involving Dow Corning Corporation, which have been pending in the Bankruptcy Court for the Eastern District of Michigan since May 15, 1995, significantly affect not only the institution and pursuit of claims against Dow Corning, but also further discovery from Dow Corning and its employees. Applications for relief from the automatic stay provisions or from other orders of the Bankruptcy Court should be made in that Court.

(d) "Settling Defendants". In general, institution and pursuit of claims against companies who are parties

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14. The distribution formula for the approximately $5 million provided under Bioplasty's reorganization for implant claimants will be set by the Court at a later time, and it is anticipated that, because of the very limited funds set aside for such recipients, the Court will give preferential, if not exclusive, consideration to those who do not have potential claims against other manufacturers.

to the Revised Settlement Program (see ¶ 1 above), as well as discovery from such companies, is precluded unless and until a plaintiff opts out from that settlement or from the earlier global settlement. Bristol, Baxter, 3M, McGhan, and Union Carbide may, at the present time, engage in settlement discussions with persons who opt out from this class settlement only on an individualized basis (*i.e.*, not as part of a settlement of a group of cases or claims) and, with respect to those who did not opt out of the earlier global settlement, only if the case is specifically set for trial or if the discussions take place under a court-sponsored mediation or arbitration program.

7. **Remand and Transfer of Cases.**

(a) **Procedures.** The first large group of cases suggested to the JPMDL for remand to federal transferor courts, resulting ultimately in the remand by the Panel of approximately 300 cases, occurred only after extensive pre-trial hearings and conferences, and consumed about 3 weeks of time by this Court and counsel. State remand orders (and the few orders that have transferred cases under 28 U.S.C. § 1404) have, to date, generally been based on motions, without individual conferences. Given the large number of cases that are ready — or may be nearing the stage — for remand or transfer, this Court is reserving its decision on the procedures that may most efficiently and economically be employed to consider potential remand or transfer. This Court does anticipate, however, that, whatever the procedures, a substantial number of cases

will, during the coming months, be remanded to state courts, be transferred to other federal courts, or be recommended to the JPMDL for remand to federal transferor courts.

(b) **Record on Remand.**

(1) The basic record in each constituent action or severed claim remanded or transferred to another court consists of the documents docketed and filed in the case file for that particular case, including the order from this Court or from the JPMDL remanding or transferring the case to the Remand Court.

(A) However, since the orders and other documents docketed and filed in the Master File, CV92-P-10000-S, are also, to the extent applicable (which in some cases will involve the adoption by reference of materials in that Master File), to be treated as docketed and filed in the individual cases, many documents in the Master File may also be needed as a part of individual case files. The most significant documents from the Master File (see Appendix A) will, therefore, be submitted to each Remand Court for inclusion, as court rules permit, either in a Master File in that court or in the individual case files as appropriate. Although not listed as part of the "record," the various documents produced to the depository in Cincinnati and the transcripts of the various MDL depositions

should be viewed as also produced in each of the constituent cases.

(B) Litigants in a particular case may conclude that, in addition to those documents from Master File designated by this Court as meriting inclusion in the record, there are other documents filed in MDL-926 that should be also so designated. As this Court's designation is intended merely to reduce the size of the record on remand and not to prejudice any substantive rights of a party, this Court will liberally honor requests by parties to include additional documents as part of the record on remand for particular cases.

(2) The documents from CV92-P-10000-S that are viewed by this Court as ones to be submitted to each Remand Court for potential inclusion in the record on remand are listed in Exhibit A to this Order.

(3) It is impractical to require the parties to enter into a stipulation governing the record on remand for each individual action in these consolidated proceedings. Accordingly, this Order constitutes the designation required under Rule 14(g) of the Rules of the JPMDL, but without prejudice to the rights of the parties to seek designation of additional documents for inclusion as part of the record on remand.

(c) **Further Proceedings and Actions Needed in Remand Courts.** A few cases may be ready for trial at the time of remand or transfer. For most cases, however, one or more of the following pretrial actions will be needed in the Remand Court before the cases are ready for trial:

(1) Potential refinement of the complaint and answer, including dismissal of unnecessary or inappropriately joined defendants.

(2) In multi-plaintiff complaints, consideration of the extent to which severance for further pretrial proceedings or trial is appropriate.

(3) Developing and implementing a plan for completion of discovery, including potential modification of the provisions of ¶ 4(d) of this Order. (Remaining discovery should primarily be plaintiff-specific, including discovery from plaintiff, from plaintiff's treating physicians, from any physician examining the plaintiff under Fed. R. Civ. P. 35 or its state counterpart, and from experts who will testify on issues of specific causation relating to the plaintiff's claims.)

(4) Consideration of motions for summary judgment based on the substantive law of the particular jurisdiction.

(5) Possible referral of case to mediation or arbitration, or other procedures to foster settlement.

(6) Setting of case for trial, which may include additional provisions relating to listing of witnesses and exhibits, the reduction of objections at trial, and procedures for considering (and reducing) motions in liming.

(d) **Suggestions for Conducting Further Proceedings in Remand Courts.** Remand Courts that can expect to have a significant number of breast-implant cases should consider, if they have not already done so, the following:

(1) Creating a master file in the court in which all motions and orders having general application, are docketed and filed, eliminating the need for multiple docketing and filing in individual cases files.

(2) Assignment of all breast-implant cases, at least for further pretrial proceedings in the court, to one judge. Depending on the number of cases, it may be necessary to reassign some cases to other judges for trial.

(3) Conducting one or more additional pretrial and status conferences, whether on a case-by-case basis or for all breast-implant cases in the court. State and federal judges having responsibilities for implant cases in the same jurisdiction should consider holding at least one joint conference in order to develop a coordinated plan of management.

(4) Establishing a realistic plan for completion of discovery and trial settings of individual cases. For cases in which relatively little plaintiff-specific discovery has been completed, a period of 6 months or more may be needed for this discovery. Each court will need to consider the appropriateness of using multiple trial settings or consolidating cases for trial.

(5) Controlling further discovery to reduce the burdens and conflicts that may be imposed on persons who are potential witnesses in many cases in many states. In particular, Remand Courts should require parties seeking generic discovery to demonstrate that the information sought is not available from other sources, such as the Depository in Cincinnati or the CD-ROM disks or through depositions previously taken.

8. **Common Benefit Fund.** Under Order No. 13, establishing a Common Benefit Fund to compensate and reimburse attorneys for services performed and expenses incurred for the common benefit of breast-implant plaintiffs, all federal breast implant cases that are settled, compromised, dismissed, or resolved by judgment, are subject to an assessment of six percent of the gross monetary recovery, and the defendants are to withhold this assessment from amounts paid to Plaintiffs or their counsel. In Order No. 17, the Court extended Order No. 13 to impose that same assessment on recoveries, whether in federal or state court or without court action, by persons who did not exercise their initial right to opt out of the *Lindsey* class but who at a later date exercise such an opt-out right.

Appendix A

This the 25th day of March, 1996.

s/ Sam C. Pointer, Jr.
Sam C. Pointer, Jr.
United States District Judge

Appendix A: Documents from CV92-P-10000-S to be Transmitted to Remand Courts

Appendix B: Provisions relating to "Expert" Witnesses

Appendix A

APPENDIX A - DOCUMENTS FROM CV92-P-10000-S TO BE TRANSMITTED TO REMAND COURTS

Order No. 1	Initial Case Management Order; entered June 26, 1992
Order No. 2	Designation of Liaison Counsel; entered August 24, 1992
Order No. 3	Extension of Opt-Out period for *Dante* class; entered September 8, 1992
Order No. 5	Revised Case Management Order; entered September 15, 1992, but with most current versions of Exhibits B (Service List) and C (Plaintiffs' National Steering Committee)
Order No. 6	Requiring production of certain Baxter documents; entered September 25, 1992
Order No. 7	Modification/Clarification of Order No. 5; entered October 6, 1992
Order No. 8	Restrictions on direct communications by defendants with class members; entered October 16, 1992
Order	Modifying Order No. 8; entered November 9, 1992

Appendix A

Order No. 9	Modifying service lists, further modifying Order No. 8, and miscellaneous other matters; entered January 11, 1993
Master Complaint	Amended Master/Sample Complaint; filed May 3, 1993
Master Answers	(filed seriatum by national defendants)
Order	Governing Expedited Discovery and The Taking of A Videotape Deposition for Preservation of Testimony for Trial; entered April 22, 1993
Order No. 11	Deposition Guidelines; entered June 30, 1993
Order No. 13	Establishing Plaintiffs' Litigation Expense Fund; entered July 23, 1993
Order No. 14	Order Approving Mentor Settlement; entered September 10, 1993
Order	Denying Baxter's Motion to Dismiss; entered November 29, 1993
Order No. 19	Confidentiality of class membership information; entered June 7, 1994

Appendix A

Order	Opinion and Final Judgment Global Settlement; entered September 1, 1994
Order	Granting Corning, Inc. Summary Judgment; entered April 25, 1995
Order	Denying Dow Chemical Summary Judgment; entered April 25, 1995
Order	Denying Bristol-Myers Squibb Summary Judgment; entered April 25, 1995
Order	Granting Scotfoam Summary Judgment; entered April 25, 1995
Order	Granting certain *Forum Non Conveniens* motions; entered April 25, 1995
Order No. 24	Granting Surgitek, Inc. and Cabot Medical Corp.'s Summary Judgment; entered August 9, 1995
Order No. 25	Denying Koken's Motion to Dismiss; entered August 10, 1995
Order No. 26	Declaring Opt-out Rights and Procedures; entered October 10, 1995
Order No. 27	Approving Revised Settlement Program, with injunctions; entered December 22, 1995

Appendix A

Order No. 27A	Supplemental items relating to Revised Settlement Program, including listing of brand names; filed December 29, 1995
Order No. 28	Denying Dow Chemical's Motion to Reconsider; entered December 26, 1995
Order	Denying General Electric's Motion for Summary Judgment; entered March 20, 1996
Order No. 30	Pretrial and Revised Case Management Order (this order), with Exhibit B (to be entered shortly)
Stipulation	Regarding Potential Objections to Documents; to be entered shortly

A single copy of these documents will be provided to each Remand Court, which may, if its rules so require, copy these documents for inclusion in the case file of individual actions rather than merely filing in a master file for that court.

Supreme Court, U.S.
FILED
APR 14 1999
CLERK

(3)

No. 98-1386

In The

Supreme Court of the United States

October Term, 1998

IN RE: SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION (MDL 926)

CAROL INGLE, et al.,

Petitioners,

v.

DOW CORNING CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

1. Respondent Steering Committee, having successfully contended before the Court of Appeals that the order challenged by petitioners was interlocutory, now urges, in the alternative, that this Court should deny the writ because petitioner failed to appeal from two earlier orders that addressed the imposition of assessments upon claimants involved in the MDL proceedings – in substance, an argument that petitioners were both too early and too late. The fact that the district court dealt with the subject on three successive occasions hardly commands the conclusion that petitioners, having refrained from seeking review of the first two orders, were estopped from appealing the third. As pointed out in the petition (pp. 3-5), the orders were entered at different stages of ongoing proceedings that produced successive settlement proposals and renewed opportunities to opt out. The orders, as applicable to petitioners, varied significantly in their particulars. It is petitioners' claim that the assessment imposed by the district court is excessive and unreasonable as applied to plaintiffs who opted out of the MDL proceeding. As stated in our petition (p. 14), the opt-out claimants question the propriety of imposing "the same levy upon those who accept the settlement approved by the MDL court and those who proceed independently," given that the latter will be heavily dependent upon local counsel and the conduct of further proceedings. In short, petitioners' grievance took shape by virtue of their opting out. It was after they opted out, and would no longer have connection with the MDL court, that that court's assessment levy took on the essential aspects of finality with regard to them.

2. The sole question before this Court is whether petitioners were erroneously denied the opportunity to secure review of the merits of the assessment order before the Court of Appeals that has exclusive appellate jurisdiction over the MDL court.

We have pointed out in our petition that relegating opt-out plaintiffs to the possibility of securing some form of review of the assessment issue in trial courts located in various parts of the country – transferor courts or courts in which negotiated settlements are reached – is almost certain to prove fruitless. Moreover, intervention by those fora, in the event it did occur, would invite conflict and confusion, with no ready means of resolution.

Strikingly, respondent makes no attempt whatever to address the problems generated by its position. It says simply that petitioners' appeal was from an interlocutory order. When, in its view, will the order have the requisite indicia of finality? How, when, and where will an opt-out plaintiff get her day in court on the claim that the MDL court's order subjected her to an unreasonably high assessment? Respondent suggests no avenue of review whatever.

The only practical answer is one that is readily justified by this Court's precedents. The order of the MDL court has conclusively determined the petitioners' liability under an assessment order providing compensation to the plaintiffs' steering committee. That determination is, of course, completely separate from the main issue in this products liability litigation, the right of plaintiffs to recover from the defendant breast implant manufacturers. There is no prospect of effective review before trial

courts scattered in various sections of the country. In addition, considerations of fairness and efficiency establish the appropriateness of review by the court of appeals that exercises jurisdiction over the MDL court. Finally, there is no question that the right at stake – a meaningful opportunity to pursue effectively one's guaranteed right of appeal – is of fundamental importance.

This case meets in every material respect the criteria developed by this Court in *Cohen v. Beneficial Industrial Loan Corporation* and its progeny. Failure to invoke *Cohen* in this situation will result in the denial of any practical route of appellate review on an issue – the alleged excessiveness of the MDL court's assessment – with respect to which plaintiffs have a conceded right to appellate consideration.

Respectfully submitted,

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